THE W. B. CARPENTER CO., PRINTERS.] [AUGUST, 1894.

Brief of Carlisle, Wells and McNeal for Appt.

The Supreme Court of the United States.

Filed Oct. 12, 1894.

Guadalupe Thompson, Administratrix of the Estate of Alfred Bent, deceased; George Thompson, her husband; Charles Bent, Julian Bent and Alberto Silas Bent.

Appellants.

vs. (No. 387.)

The Maxwell Land Grant & Railway Company, and Luz. B. Maxwell.

Appellees.

AND

Charles Bent, Julian Bent and Alberto Silas Bent.

Appellants.

vs. (No. 388.)

Guadalupe Miranda; Jesus G. Abreu, as Surviving Executor of the last Will of Charles Beaubien; Luz. B. Maxwell, *et. al.*

Appellees.

BRIEF FOR APPELLANTS.

S. D. ROUSE,
For Appellants.

JOHN G. CARLISLE,
JAMES O'HARA,
CALDWELL YEAMAN,
E. T. WELLS,
R. T. MCNEAL,
JOHN G. TAYLOR,
Of Counsel.

The Supreme Court of the United States.

Guadalupe Thompson, Administratrix of the Estate of Alfred Bent, deceased; George Thompson, her husband; Charles Bent, Julian Bent and Alberto Silas Bent.

Appellants.

vs. (No. 387.)

The Maxwell Land Grant & Railway Company, and Luz. B. Maxwell.

Appellees.

AND

Charles Bent, Julian Bent and Alberto Silas Bent.

Appellants.

vs. (No. 388.)

Guadalupe Miranda; Jesus G. Abreu, as Surviving Executor of the last Will of Charles Beaubien; Luz. B. Maxwell, *et. al.*

Appellees.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

By agreement of Counsel, Cases Nos. 387 and 388 are to be heard together.

Case No. 387 has been to this Court on appeal once before and is reported in 95, U. S. p. 391, where the history of the case is set out in full. The decision of this Court reversed that of the Supreme Court of the Territory of New Mexico, from which Court the appeal had been prosecuted, and after the reversal the case went back to the Supreme Court of the Territory and then to the District Court for the County of Colfax, where it originally began.

By the amendments to the bill of complaint then filed and the answers thereto, practically the same questions were raised as in Case No. 388, a statement of which case is as follows:

Where reference is made to the Record herein, it is to the Record of Case No. 388.

On the 11th day of January, 1841, the Government of Mexico granted to Charles Beaubien and Guadalupe Miranda a tract of land lying in the Territory of New Mexico specifically described in the Appellants bill of Complaint herein, page 2 of the Record, containing about two million acres.

Subsequently, this grant was confirmed unto the grantees named, by the United States Government, by an Act of Congress approved on the 21st day of June, 1860, entitled "An Act to confirm certain private land claims in the Territory of New Mexico."

In 1859, Alfred Bent, and his two sisters Estefana and Teresina, together with Alexander Hicklin, the husband of Estefana filed a bill in Chancery (p. 46, Record) in the District Court of New Mexico for the County of Taos, against Charles Beaubien, Guadalupe Miranda, Lucien B. Maxwell and Jose Pley, in which bill, the complainants claimed that their father Charles Bent, deceased, at the time of his death was jointly interested with Beaubien and Miranda in the grant of land referred to above, and that he was justly entitled to one-third part thereof, and they pray that their right to a third part of said grant may be established, and that they may have partition of same. Maxwell and Pley were alleged to have acquired some interest in the grant, claiming under said Beaubien and Miranda. The prayer of the bill was as against all the Defendants that the title of the said Charles Bent, to the one-third part thereof might be established, and that a partition might be had.

In that suit on the 3rd day of June, 1865, a decree was made establishing the Bents title to an undivided fourth part of the land, the right of succession of the Complainants, and directing a partition.

Commissioners were appointed by the decree, and ordered to report at the next term. The Court reserving its "decree as to the partition and payment of the costs in the cause until a future term of this Court." (Decree is found on page 16, Record.)

Subsequent to the decree of June 3rd, 1865, some negotiations were entered into between Maxwell, who had acquired the principal interest in the property and the Bents, looking to a purchase by Maxwell of the Bents interest.

Alfred Bent, one of the Complianants died December 15th, 1865, leaving a widow, Guadalupe Bent, and three infant children who are the appellants herein, as his only children and heirs. Long afterward, to-wit, in 1867, it appeared that Alfred Bent left a

will, which was probated March 6th, 1867, (p. 64-65, Record.)

In April, succeeding the death of Alfred Bent, an order was entered in the cause suggesting the death of Alfred Bent and making his infant children parties complainant, and continuing the cause, (p. 69, Record.) A few days afterward at the same term the following order was entered:

"By agreement of the parties the continuance of this cause "made on a former day of this term of this Court is set aside; "and on motion of solicitors for complainants, Guadalupe Bent is "hereby appointed guardian *ad litem* and Commissioner in "Chancery for the minors of Alfred Bent, in this cause with full "power to execute deeds or to carry into execution all sales or "transfers made of their interests in and to the real estate "therein described to Lucien B. Maxwell, one of Defendants in "said cause, and that this cause stand continued until the next "term of this Court."

On the 3rd day of May, 1866, Guadalupe Bent, as guardian *ad litem* of Charles, Julian and Alberto Silas Bent, under the order above quoted, executed a deed of conveyance, (p. 70, record) in fee to the said Maxwell for the one undivided twelfth part of the property in question belonging to the said Charles, Julian and Alberto Silas, heirs of Alfred Bent, deceased.

Estefana Hicklin and Teresina Scheurick, who in the meantime had intermarried with Aloys Scheurick, together with their husbands, executed deeds of conveyance to Maxwell about the same time.

At the September term of the District Court of 1866, this decree was entered, (p. 73, Record.)

"*Whereas*, an interlocutory decree was rendered at a former "term of this Court in the above cause, decreeing one-fourth of "the land mentioned in the petition herein to the Complainants "in this cause, and appointing Commissioners to divide and set "apart the portion so decreed; and whereas, said interlocutory "decree was never carried into affect; and whereas since the time "of the rendition of said decree, a mutual agreement has been "made between the parties to this cause, settling and determining "all the equities of the same.

"It is therefore hereby ordered, adjudged and decreed by "the mutual consent and agreement of the said Complainants as "well as of the said Defendants in the cause, that the interlocutory "decree above mentioned, together with all orders made under "and by virtue of the same be set aside; and by the mutual "consent and agreement of the said parties, it is hereby further "ordered, adjudged and decreed that the said Lucien B. Maxwell, "one of the Defendants in this cause pay to the said Complainants "the sum of $18,000 to be divided among them *per stirpes;* that "is to the said Aloys Scheurick and Teresina Bent, his wife, one "third part, and to Alexander Hicklin and Estefana Bent, his

"wife, another third part, and to Charles Bent, Julian Bent and "Alberto Silas Bent, the children and heirs of Alfred Bent, "deceased, the remaining third part, to be equally divided among "the last named, and to be paid into the hands of Guadalupe "Bent, widow of the said Alfred Bent, deceased, and guardian "*ad litem* for said children, for the purposes of the said division.

"And upon the further consent and agreement of the said "parties, it is hereby further ordered, adjudged and decreed that "the said Alexander Hicklin and Estefana Bent, his wife, the said "Aloys Scheurick and Teresina Bent, his wife, and the said "Guadalupe Bent, guardian *ad litem* for Charles Bent, Julian "Bent and Alberto Silas Bent, children and minor heirs of the "said Alfred Bent, deceased, within ten days from the date of "this decree make, execute and deliver to the said Lucien B. "Maxwell, good and sufficient deeds of conveyance, of all their "rights, title, interest, estate, claim and demand of, in and to the "lands in controversy in this cause, the said Guadalupe, guardian "*ad litem* as aforesaid, and the said Alexander Hicklin and "Estefana Bent, his wife, and the said Aloys Scheurick and "Teresina Bent, his wife, in their own names. And by further "consent and agreement between the said parties, it is further "hereby ordered, adjudged and decreed that the costs of this suit "shall be paid, each of the said parties to pay the separate costs "in the same, made by themselves."

On the 7th day of April, 1882, the Appellants filed a bill in Chancery, (p. 1, Record), in the District Court for the County of Colfax in the Territory of New Mexico, in which after setting out the facts herein stated they charge that the said Guadalupe Bent, who is a Mexican woman and the mother of Complainants was, at the time of her appointment as guardian *ad litem* of Complainants, and at the time of her said pretended conveyance, and at the time of the entry of the decree complained of, wholly ignorant of the English language, unable to read, write or speak the same; unfamiliar with business, or the proceedings of Courts of law, unacquainted with the rights of Complainants or her duties in that behalf, or the bounds or extent of the grant, or the character or value thereof; ignorant of the confirmation of the grant by the act of Congress aforesaid; and ignorant of the decree of the District Court directing partition of the said grant as hereinbefore set forth; or what part or share in said grant was claimed by Complainants' father in his life time.

And they further charge that the said Guadalupe Bent, was accustomed to consult with and rely upon the said Aloys Scheurick, the husband of Teresina Bent, in reference to her business, property and affairs, and that she reposed special trust and confidence in the said Scheurick.

That the said Maxwell was at that time, and long before that, a man of great wealth, and was possessed of great power and

influence; throughout the County of Taos and the Territory of New Mexico, all of which was at all times well known to Guadalupe Bent, and the said Maxwell well knowing the weakness and ignorance of the said Guadalupe Bent, and her inexperience in matters of business and proceedings in Courts, and her want of information as to the extent, character and value of the said grant, and her ignorance of the act of Congress aforesaid confirming said grant, caused and procured the said Guadalupe Bent to be appointed guardian *ad litem* for Complainants, and procured the said pretended conveyance to be prepared for execution by the said Guadalupe Bent, and caused the same to be written in the English language, and caused and procured the said Aloys Scheurick, to believe and to represent, and said Scheurick by procurement of the said Maxwell, or otherwise, did represent to the said Guadalupe Bent, that the said grant of lands was for the most part fit only for grazing, that the same contained little or no mineral of value, and that the same extended only to the North line of the said Territory of New Mexico, as then constituted, that he, Maxwell, was the owner of the major part of said grant, or was buying or about to purchase the shares and interests of all other owners therein, and might and would control the whole of said grant, and exclude the Complainants from all share or part thereof; that the said Maxwell would pay to said Guadalupe Bent the sum of $6,000 for the interest of Complainants, that she was authorized to sell and convey said interest, and that unless she should acccept the said sum of $6,000, neither she nor Complainants would ever realize anything for the interest of Complainant.

And Complainants further charge that confiding in these representations, and moved and induced by same and the wealth, power and influence of Maxwell, the said Guadalupe Bent executed the pretended conveyance above set out.

And they further charge that neither at the time of the execution of the said conveyance, nor at any time before that, was the pretended deed of conveyance, read or interpreted or explained to her; that same was executed by her without the advice of Counsel, and that at the time she was wholly ignorant of the extent of the grant, the value thereof and of the rights and shares of Complainants therein, and was believing in all the representations aforesaid; and they further charge that neither then nor at any time thereafter did the said Maxwell pay to said Guadalupe Bent, nor to Complainants, nor any one for them the said $6,000, although Complainants believe that about the year 1868, the said Maxwell paid to Geo. W. Thompson, who in the year 1867, married the said Guadalupe Bent, some small sums of money, and sundry articles of personal property, much less in value than the said sum of $6,000, all of which was by said Thompson converted to his own uses, and no part thereof was invested for or applied to the uses of Complainants.

And they further charge that neither at the time of the entry of the decree of September, 1866, nor at any time before that, did the said Guadalupe Bent, nor Counsel nor Solicitor for Guadalupe Bent, nor any other person authorized to agree or consent for Complainants in that behalf, in fact, agree or consent, as in the decree is recited, or agree or consent to the entry of said decree, nor to the vacation or setting aside of the former decree first herein recited; but they charge that the decree of September, 1866, was procured to be entered in the absence of Guadalupe Bent, and without notice to her of any intention to apply therefor. They further charge that it was by reason of the alleged consent and agreement of the said Guadolupe Bent, which she had never in fact given, that the District Court without any reference to the master, and without inquiry or judicial examination as to whether or not said decree would be beneficial to Complainants, gave and entered said decree.

Complainants further charge that consent and agreement of Guadalupe Bent to the decree of September, 1866, if such consent or agreement had in fact been voluntarily or intelligently given or made, would have been wholly ineffectual to bind Complainants, but that said decree, and the said conveyance of the said Guadalupe Bent to the said Maxwell, were and are, and each of them always was, and now is, wholly void as against Complainants.

The Complainants charge that the before described tract of land contains two million acres, and abounds in valuable mines of gold and silver, and valuable deposits of coal and other minerals and metals; that said grant contains a large extent of well-watered, irrigable lands, suitable for cultivation; also extensive forests of pine and other timber trees; and all the residue of the said lands is valuable for grazing; that the interest of Complainants at the time of the entry of said decree of September, 1866, of the said District Court, was reasonably worth the sum of $100,000 and more, and has been ever since appreciating in value; that the same in fact extends beyond the Northern border of the Territory of New Mexico, two hundred thousand acres, or thereabouts, of valuable land being within the limits of the State of Colorado, all of which was known to said Maxwell at the time of procuring said conveyance, but was unknown to the said Guadalupe Bent.

They charge that their father Alfred Bent left a considerable estate in houses and lands, other than said grant, and in moneys and personal property, and the said Guadalupe Bent, Complainants' mother out of said estate, was then and always afterward well able to support and educate Complainants, and at no time was there any necessity for the sale of Camplainants interest in said lands.

They charge that these facts were concealed from the District Court, at the time of the entry of the decree of September, 1866.

They charge that the decree of September, 1866, directing the conveyance and vacating and setting aside the former decree

is erroneous, in that it appears by the record that the District Court entered the decree upon the consent merely of parties, without setting forth who assumed to represent Complainants, or consent thereto in Complainants' behalf.

And in this—that although Complainants were infants of tender years, the decree was made by the District Court by consent of parties merely, without any reference to the master, or the examination of witnesses or judicial inquiry as to whether in fact such agreement as therein recited had been made, or whether the decree was or would be beneficial to Complainants, or whether any necessity existed for the sale or disposition of Complainants interest.

And in this—that it appears by the record that the District Court directed the said Guadalupe Bent should convey Complainants interest in said lands for a fixed sum, and to a certain person.

And in this—that the decree directed the conveyance to Maxwell by a day certain, and did not fix or limit any day for the payment by said Maxwell of the purchase price.

And in this—by said decree the District Court assumed to, and did assume to dispose and convert into money the freehold estate in lands of Complainants, then being infants of tender years, without any reason, cause, or necessity for such disposition or any disposition whatsoever thereof, and without any direction or security for the investment or preservation of such money.

And the execution of said decree has never been carried out, that no such conveyance as in the decree is directed has ever been made, nor has the money ever been paid.

That the Maxwell Land Grant & Railway Co., and Maxwell about the year 1870, exhibited in the District Court for the County of Colfax, in the Territory of New Mexico, a bill of Complaint against Guadalupe Thompson as administratrix of Alfred Bent, deceased, and Complainants, and setting forth among other things the two decrees above mentioned and praying that the trust in the first named decree established and declared, might be terminated and extinguished; that same was answered by Defendants by George W. Boyles, their guardian *ad litem*; testimony was taken, and a decree entered in said District Court, whereby it was adjudged that The Maxwell Land Grant & Railway Co. held said land free from any claim or interest of any of Defendants including these Complainants; that upon an appeal of all the Defendants to the Supreme Court of the Territory, the decree was affirmed, and upon an appeal from that Court to the Supreme Court of the United States, that decree was reversed, and said cause was remanded into the said Supreme Court of the Territory, and thence into the District Court of the said County of Colfax, and in said last Court The Maxwell Land Grant & Railway Co. has amended its bill in divers particulars, but sets

up nevertheless the decree of September, 1866, of the District Court of the County of Taos, and relies thereon.

They further charge that by reason of the decree of September, 1866, they have been unable to carry out the decree of June 3rd, 1865.

They further charge that said Maxwell has conveyed away certain parts or portions of said grant, that certain mines have been opened, certain portions of said land cultivated and great profits have accrued by reason of same.

To the end that the decree of June, 1865, establishing the rights of Complainants' ancestor, and directing partition thereof may stand and be enforced, and that it may be ascertained what lands have been conveyed away by Maxwell, and that the decree of September, 1866, be reversed annulled and from hence forth be held for naught, and that the pretended deed of conveyance of Complainants interest be declared null and void, and delivered up to be cancelled, and that an account be taken of the net gains and profits received by the said Maxwell Land Grant & Railway Co., and that one-twelfth part of said gains be decreed to be paid to Complainants, and for such other equitable relief as they may be entitled to, Complainants bring their bill.

A demurrer to the bill was sustained and the bill was dismissed, and upon an appeal to the Supreme Court of the Territory, the order of the District Court was reversed (3 New Mexico Reports, p. 158), and the case went back to that Court where issue was joined and trial had; upon that trial, Complainants' bill was dismissed, and upon appeal the Supreme Court of the Territory affirmed (p. 44, Record) the District Court, and the Complainants have appealed from the decree of the Supreme Territorial Court to this.

SPECIFICATION OF ERRORS.

On pages 89 and 90 of the Record of No. 388, will be found the following assignment of errors, upon which we shall rely upon the hearing for a reversal. The assignment of errors in Case No. 387 is virtually the same as in Case No. 388, and as we have before said the decision of No. 387 must depend upon the decision in No. 388, the assignment of errors in No. 387 is not here set out.

First.—The decree of the Supreme Court of the Territory of New Mexico, affirms the decree theretofore given in the District Court in and for the County of Colfax, in said Territory, whereas, in the decree of the said District Court, manifest error intervened to the prejudice of the said Appellants, and decree ought to have been given in the Supreme Court of the Territory of New

Mexico, reversing and annulling the decree so given in the District Court.

Second.—Also in this, to-wit: That the facts found and declared by the Supreme Court of the Territory of New Mexico are not sufficient to sustain the decree given in the District Court of the County of Colfax aforesaid, nor the decree of affirmation thereof given in the Supreme Court of the Territory of New Mexico, but on the contrary thereof upon the facts found by the said Supreme Court of the Territory of New Mexico, the decree given in the District Court of the said County of Colfax ought to have been reversed, annulled and in all things held for naught.

Third.—Also in this, to-wit: That in and by the said record and proceedings, it doth appear that by a certain final decree made and given in the District Court in and for the County of Taos, in the Territory of New Mexico, on the 3rd day of June 1865, Alfred Bent, ancestor of the now Plaintiffs and Appellants, was vested with one undivided twelfth part and share in the premises named in the bill of Camplaint of Plaintiffs in the District Court of the said County of Colfax, and the decree afterwards at the September Term, 1866, given in the said District Court in and for the County of Taos, assuming to vacate, annul and set aside the final decree given on the 3rd day of June, 1865, was and is erroneous and void as against Appellants, and decree ought to have been given in the District Court in and for the said County of Colfax, according to the prayer of the Complaint of these Plaintiffs in the said District Court; whereas, in and by the judgment and opinion of the said Supreme Court the final decree of June 3rd, 1865, so given in the District Court of the said County of Toas, was declared to be interlocutory and further in and by the judgment, decree and opinion of the Supreme Court of the Territory of New Mexico, it is declared that the said decree entered at the September Term, 1866, of the said District Court in and for the County of Taos, assuming to vacate, annul and set aside the said former decree of the District Court upon the consent merely of the parties, not showing or setting forth who assumed to the said Court to represent or consent for the now Plaintiffs and Appellants in that behalf, and no evidence being heard touching the matter, was and is nevertheless effectual to vacate, annul and set aside such former decree in favor of Plaintiffs' ancestor, the said Alfred Bent.

Fourth.—It appears by the record and proceedings of the said Supreme Court that by a certain former decree and opinion rendered and given in this same suit, in the said Supreme Court of the Territory of New Mexico, it was found, adjudged, decreed and declared that by a decree given in the District Court in and for the said County of Taos, on the 3d day of June, 1865, as set forth in the Bill of Complaint of these Plaintiffs herein, there was vested in Alfred Bent, ancestor of these Plaintiffs, a

legal estate in the undivided one-twelfth part of the lands in the said Bill of Complaint mentioned, and that the decree given in the District Court in and for the said County of Taos, at the September Term, 1866, thereof, assuming and pretending to vacate and set aside such former decree in the District Court, was wholly erroneous and void; nevertheless the said Supreme Court of the Territory of New Mexico, by the decree and opinion rendered and given herein, at the July term thereof last past, doth in effect find, declare and adjudge, that the decree so given in the District Court in and for the said County of Taos, at the September term, 1866, was effectual to vacate, annul and set aside such prior decree of the said District Court.

BRIEF OF ARGUMENT.

The decree of June, 1865, was final.

Forgay vs. Conrad, 6 Howard, p. 201.

Whiting vs. The Bank, 13 Peters, p. 11.

Thompson vs. Dean, 7 Wallace, p. 342.

Ray vs. Law, 3 Cranch, 179.

Michaud vs. Girod, 4 Howard, 505.

Winthrop Iron Co. vs. Meeker, 109 U. S., p 180.

Craighead & Wilson, 18 Howard, p. 201.

Perkins vs. Fourniquet, 6 Howard, p. 206.

The Bank of Lewisburg vs. Sheffey, 104 U. S., p. 445.

The Keystone Manganese and Iron Co. vs. Martin, 132 U. S., p. 91.

McGourkey vs. The Toledo & Ohio Central R'y Co., 146 U. S., p. 533.

The will of Alfred Bent, vested in Guadalupe Bent, a trust estate for life, charged with the maintenance of the three children.

Henderson vs. Haines, 2 Met. (Ky.), p. 342.

The decree of September, 1866 was not binding on Appellants.

1. Because the District Court had no power to appoint a guardian *ad litem* to convey away by deed the interest of minors, and the guardian *ad litem* had no power to convey same.—Bacon's Abridgement, Vol. 4, p. 546. Bouvier's Law Dictionary.

2. The settlement effected by those *sui juris* was unauthorized so far as the infants were concerned, and the guardian *ad litem* could not so bind them.—Taylor vs. Franklin Savings Bank, 50 Fed. Reporter, p 289.

3. The agreement or arrangement made by the guardian *ad litem*, in the case at bar was not such as a guardian *ad litem* was authorized to make.—Kingsbury vs. Buckner, 134 U. S., p. 134.

4. The interests of the minors in the case at bar were not of such character that the Chancellor had the power to allow them to be bargained away.—Cochran vs. Van Sorley, 20 Wendall, p. 376.

5. Even if the infants' interests were of such nature that the Chancellor might with legal discretion have allowed them to be sold for a money consideration, the decree herein must be reversed, for the decree of sale of the infants' interests was brought about by an unauthorized agreement, and as to the entering of which the District Court exercised no legal discretion whatever. There was nothing in the pleadings looking to a sale of the estate of the infants, and a decree directing its sale was grossly erroneous, if not wholly unauthorized. The decree of September, 1866, was so manifestly without the exercise of a legal judicial discretion such as would have protected the interests of the minors and obtained a fair and full price for the estate sold by exposing it to public vendue rather than, as seems to have been the case, to allow the greed of an unconscionable litigant who had controverted the title of the minors throughout the entire pendency of the suit, to prevail by the indulgence of the Court, and the unjust sacrifice of the estate of those who were incapable of protecting themselves, that it ought to be reversed.

ARGUMENT.

From an investigation of many authorities upon the question of the finality of decrees, it appears that what does or does not constitute a final decree depends in great measure upon the peculiar circumstances of each particular case, rather than upon any specific rule, and this being true the purpose of the action filed by the Bent heirs on September 12, 1859, and the effect of the decree of June, 1865, therein rendered must be examined.

From an examination of the bill (p. 46 of the Record), and

the amended bill (p. 49 of the Record), it will be seen that the principal point in the cause was the establishment of the Bent's claim to a portion of the land granted to Beaubien and Miranda, and while a partition is asked for, that must follow of course, if it be decided that Complainants were entitled to any part of the land. It was the establishment of their title primarily which was sought, and incidental to that was the partition.

The decree (p. 58 Record) established the Complainant's claim, and confirmed to them and their heirs and assigns forever one undivided fourth part of the land.

This is, beyond question, final as to the claim of Complainant to a part of the land.

There are three cases cited by the Supreme Court of the Territory of New Mexico in its opinion (p. 81 Record) to which we especially desire to draw the Court's attention, and in comparing these cases we would respectfully submit that the Territorial Court was in error as to the deductions drawn.

The first is the case of Forgay vs. Conrad, 6 Howard, page 201. The object of the bill in this case was to set aside sundry deeds made for lands and slaves, and for an account of the rents and profits of the property so conveyed; and also for an account of sundry sums of money which Complainant alleged had been received by one or more of the Defendants.

The case was proceeded in until it came on for hearing, when the Court passed a decree declaring sundry deeds therein mentioned to be fraudulent and void, and directing the lands and slaves therein mentioned to be delivered to the Complainant. * * * The decree then provides that the Complainant may have execution, and directs the Master to take an account of the profits of the lands and slaves ordered to be delivered up, and also an account of the money and notes received by one of the Defendants in fraud of the creditors, and concludes in these words: "And so much of the said bill as contains or relates to matters "hereby referred to the Master for a report is retained for further "decree in the premises. * * *"

This was held to be a final decree as to the matters therein adjudged.

The second case referred to is that of Craighead vs. Wilson, 18 Howard, p. 201, wherein "The Complainants filed their bill "in the Circuit Court, claiming as heirs a part of the property of "Joseph and Lavinia Erwin, deceased. * * * His property, real "and personal, was much embarrassed; the persons claiming an "interest in the succession were numerous; and from the loose "manner in which the property was managed by the testator in "his lifetime, and by those who succeeded him, great difficulty "was found in the distribution of the estate. * * * The Circuit "Court, having ascertained the heirship of the Complainants and "their relative rights in the succession, referred the matter to a

" special Master, to take an account of the succession of the said " Joseph Erwin, Sr., Joseph Erwin, Jr., and Lavinia Erwin, in so " far as it may be necessary to state the accounts between the " Plaintiffs and the heirs at law, defendants in this suit, to ascer- " tain the property in kind that remains in possession and control " of either of the defendants except Adams and Whiteall as afore- " said, what has been sold, and the prices of the same, and the " profits thereof, and he will report all the encumbrances that " have been discharged by either of the Defendants on the same, " and make to them all just allowances for payments and per- " manent and useful improvements and just expenses, and to " ascertain what may be due to the Plaintiffs from either De- " fendant, and the said Master may make a special report of any " matters that may be requisite to a full adjustment of the ques- " tions in the cause."

This was held not to be a final decree, the Court saying in this connection: " To authorize an appeal the decree must be final in all matters within the pleadings, so that an affirmance of the decree will end the suit."

The third case is that of Perkins vs. Fourniquet, 6 Howard, p. 206. The Court says: "Harriet J. Fourniquet and Mary T. " Ewing are two of seven heirs and representatives of Mary " Perkins, who was the wife of the Appellant, and who died about " twenty years before the filing of this bill; that the appellees " named were the children of a former marriage, and with their " respective husbands filed the bill now before us against the Ap- " pellant, charging that during the marriage of the appellant with " their mother there existed a community of acquests and gains in " certain property, and praying that the Appellant might be com- " pelled to account and pay over the amount due them as heirs of " their mother. The Appellant denied in his answer that any " community existed, and the case was proceeded in to hearing when " the Circuit Court passed a decree declaring that the community " did exist and that the Appellants, as heirs of their deceased " mother, had a right to recover two-sevenths of all their mother's " rights of community which accrued during her marriage with " Appellant; and also two-thirds of one-seventh as representatives " of so much of the interest of a deceased brother, and referred " the matter to a Master in Chancery to take and report an account " of the acquests and gains; and prescribing fully and with " proper precision the principles and manner in which the lands " acquired were to be divided and the accounts taken, and the " decree concludes by reserving all other matters in controversy " between the parties until the coming in of the Master's report." This was held to be not a final decree.

In both the last cases cited above, to-wit: Craighead vs. Wilson and Perkins vs. Fourniquet, the very subject of the controversy consists of complicated and unascertained accounts, and it is

absolutely essential to ascertain the true status of the parties before there can be a decree adjudging their rights, and in the case of Forgay vs. Conrad the principal subject of controversy was the setting aside of the alleged fraudulent deeds, and the accounting must follow, of course, if the deeds were found to be fraudulent, and yet the Supreme Court of the Territory of New Mexico followed Craighead vs. Wilson and Perkins vs. Fourniquet rather than Forgay vs. Conrad in deciding the case at bar when, as we contend, the very object and purpose of this case was to establish Complainant's title, and if established the decree for partition followed, of course, and absolutely every direction necessary for the partition was specifically given to the Commissioners in the decree named.

Mr. Justice Collier, of the Supreme Court of the Territory of New Mexico, in delivering the opinion of the case at bar, also cites a rule laid down in Craighead vs. Wilson, as follows: "To authorize an appeal a decree must be final in all matters "within the pleadings, so that an affirmance of the decree will end "the suit," and says (p. 82, Record), "Tested by the rule stated in "Craighead vs. Wilson it would seem that this decree [the decree "of June 3, 1865] was not final so as to be appealable, because "the pleadings certainly embraced two matters, one the establish- "ing of the interest claimed, and the other the partition sought "by the bill." In view of the language used by Mr. C. J. Taney in the case of Forgay vs. Conrad, it cannot be said that the rule laid down in Craighead vs. Wilson is the strict, universal and unalterable rule. Mr. C. J. Taney says in Forgay vs. Conrad: "The question upon the motion to dismiss is whether this is a final "decree within the meaning of the acts of Congress. Undoubt- "edly it is not final within the strict technical sense of that term. "But this Court has not heretofore understood the words 'final de- "cree' in this strict and technical sense, but has given to them a "more liberal and, as we think, a more reasonable construction "and one more consonant to the intention of the legislature." Applying the principles of the case *supra* to the one at bar, our contention must prevail when it is observed that there are *two* matters embraced in the pleadings in the case of Forgay vs. Conrad just as certainly as there are in the case at bar, and even applying the strict rule of Craighead vs. Wilson, which the Territorial Court announces that it follows in deciding the case at bar, it seems to us that even that rule may be cited as sustaining our contention, for everything contained within the pleadings is decided in the decree of June 3rd, 1865, not only the right of the Complainants to a part of the land, and that there should be a partition, but also specific directions are given as to how that partition should be made.

Forgay vs. Conrad *supra* has been referred to more than any other case upon the question of finality of decrees, and the doc-

trine therein contained has been cited with approval on many occasions. It has been expressly reaffirmed in the case of Thompson vs. Dean, 7 Wallace, p. 342, and Winthrop Iron Co. vs. Meeker, 109 U. S., p. 180. The Court in the case of Thompson vs. Dean says: "In this case the decree directs the performance of a specific act "and requires that it be done forthwith. The effect of the act "when done is to invest the transferees with all the rights of "ownership. It changes the property in the stock as absolutely "and completely as could be done by execution in the decree for "sale. It looks to no modification or change of the decree * * * "So far as the Court below was concerned the decree in the case "determined the principal matter in controversy between the par"ties, and since the decree could not be changed except through a "new and distinct proceeding it determined that matter finally * "* * The reasoning in the case just cited [Forgay vs. Conrad] "vindicates the rule as a sound construction of the acts of Con"gress relating to appeals, and is sustained by the authority of "several decisions.

Ray vs. Law, 3 Cranch, 179.

Whiting vs. the Bank, 13 Peters, 11.

Michaud vs. Girod, 4 Howard, 505.

In the case of the Winthrop Iron Co. vs. Meeker, 109 U. S., p. 180, the Court says: "In our opinion the decree as entered is a "final decree * * * The whole purpose of the suit has been "accomplished. The lease made under the authority of the meet"ing of October, 1881, has been cancelled and the management "of the affairs of the company has been taken from the manage"ment of the Board of Directors. The accounting ordered is only "in aid of the execution of the decree, * * *" and following this the Court cites Forgay vs. Conrad and the rule therein contained in support of its holding in the case under consideration.

In the case of Whiting vs. the Bank, 13 Peters, p. 11, the Court holds that a decree of foreclosure and sale is a final decree, and that the proceedings thereunder to wit: the sale and completion of the same was but a mode of executing the original decree like "the award of an execution at law."

In the Case of the Bank of Lewisburg vs. Sheffey, 140 U. S., p. 445, the question was as to which of two deeds was valid, the Court saying: "The controversy raised by the pleadings and to be "determined by the Court, was whether the property passed "under the deed to Plaintiff, or under that to Matthews, and "whether the Bank was entitled to priority. * * * On "behalf of the Bank it was claimed that the trust deed to the "Plaintiffs was void on its face, and that by the terms of that "deed, if valid, the debt of the Bank was preferred. By the "amended and supplemental answer which it sought to file, the "Bank raised the question that Glendy, not having the legal title "when he executed the deed to the Plaintiffs, and by his prior

"deed to the Bank divested himself of his equitable title, the "Plaintiffs did not as Glendy's grantees under a conveyance "without any warranty whatever occupy the position of bona fide "purchasers, nor were they protected by the Recording Statutes "of the State. * * * So that all these matters were neces-"sarily passed upon by the Court, and the decree in terms declared "that the facts stated in the amended and supplemental answer "did not change the rights of the parties in the cause, made the "injunction perpetual, and directed the fund to be brought into "Court for distribution in accordance with the provisions of the "deed of Robert J. Glendy to Hugh W. Sheffey and James Bum-"gardner, Jr., bearing date the 20th day of November, 1876. "This finally determined the entire matter litigated between the "parties, and nothing remained but to carry the decree into "execution."

In the Case of the Keystone Manganese & Iron Company vs. Matt. Marten, 132 U. S,, p. 91, and also in the Case of McGourkey vs. The Toledo & Ohio Central R'y Co., 146 U. S., p. 523, the leading cases upon the finality of decrees are cited and classified, and inasmuch as we have been unable to find a case exactly parallel with the one at bar, we have cited the above cases as containing the general principles which we think applicable to the subject discussed.

If it becomes necessary to have a construction of the will of Alfred Bent, our contention is that by the terms of that will, Guadalupe Bent held the estate devised in trust jointly for the maintenance of hereself and the children of the testator named, which trust necessarily terminates with her life, and the fee passes by the terms of the will to the children and heirs as aforesaid as stated in the conclusion of the will.

Henderson vs. Haines, 2 Met, (Ky.), p. 342.

We now come to the question as to the validity of the decree of September, 1866, so far as it effects the rights of Appellants.

On the 9th day of April, 1866, the following order, (p. 69 of the Record), was entered: "By agreement of the parties the "continuance of this cause, made herein on a former day of this "term of this Court, is set aside, and on motion of solicitors for "Complainants, Guadalupe Bent is hereby appointed guardian "*ad litem*, and Commissioner in Chancery for the minor heirs of "Alfred Bent in this cause, with full power to execute deeds, or "to carry into execution all sales or transfers made of their in-"terest, in and to the real estate therein described to Lucien B. "Maxwell, one of the Defendants in said cause, and this cause "stands continued until the next term of this Court."

The District Court had no power to appoint a guardian *ad litem* for the purpose set out in the above order.

"A guardian *ad litem* is one appointed for the infant to defend "him in an action brought against him. * * *

"The powers and duties of a guardian *ad litem* are confined "to the defense of suits."—Bacon's Abridgement, vol. 4, p. 546.

"A guardian *ad litem* is one appointed to represent the ward in "legal proceedings to which he is a party Defendant."—Bouvier's Law Dictionary, vol. 1.

With all possible respect for the Supreme Court of the Territory of New Mexico, we are constrained to say that we are altogether unable to understand upon what theory it arrives at the conclusion shown in the following language, (p. 84, Record), of Mr. Justice Collier, in delivering the opinion of the Court:

"In Taylor vs. Franklin Savings Bank (50 Federal Reporter, "p. 289), it is stated to be well settled that infants can by an "original bill in the nature of a bill for review attack any decree "against them during their infancy, and have it set aside for fraud "or error in fact."

"This Case is essentially like the Case at bar in one respect, "viz: The decree was upon a settlement and compromise made "between a foreclosing bank and the *guardian ad litem* of infant "Defendants, and the Court say: 'It may be and probably is true "that so long as this decree is allowed to stand, it is binding by "its terms on the infant Defendants;' and then after announcing "as above the rights of attack by them for fraud or error of fact, "the decree was held to be successfully impeached for fraud and "was set aside. There was no pretense in that case that the "settlement and compromise by the guardian *ad litem* vitiated of "itself the decree, but it must have been taken by the Court as "advisory, and was held unauthorized and inequitable because of "the suppression of facts known to the Plantiff." We have quoted *supra* from Mr. Justice Collier, in delivering the opinion of the Supreme Court of New Mexico, and we now quote from the case referred to by him. "Assuming as I do the right of these "minors to attack this bill of foreclosure by their bill, I think the "Court must now assume that had all the facts touching the "validity of the securities involved in that suit been presented to "the Court, the Court must have held that the securities sought "to be foreclosed and enforced in that proceeding were invalid "and have dismissed that suit for want of equity as against the "infant Defendants; and as the Court was prevented from doing "so, and *was led into* making an *inequitable decree by the* un-"authorized *agreement* of the *guardian ad litem*, it will in this "suit now brought by the minors themselves enter such decree as "should have been entered in the original foreclosure case."

This language in our opinion is certainly unequivocal upon the subject of the right of the guardian *ad litem* to bind the infants by an unauthorized agreement.

In the same case, p. 291, the Court says: "After the origi-"nal trust deed was found, the bank filed a supplemental bill in "the foreclosure case, which was answered. Before a report was

" made by the master, terms of settlement or compromise were " made between the bank and the guardian *ad litem* of the infant " defendants then in court."

This trust deed referred to was the paper which would have supplied all the necessary facts, and by its loss this complication arose, so that after it was found, and set up by the Bank's supplemental bill, it certainly must be assumed that it was the guardian *ad litem's* so-called compromise, and not a suppression of the facts which led to the decree complained of.

Mr. Justice Collier delivering the opinion of the Supreme Court of New Mexico also cites (p. 84 Record) Kingsbury vs. Buckner, 34 U. S., p. 650, in support, we infer, of his opinion that a guardian *ad litem* may make a compromise of the infants' rights. He says: " A guardian *ad litem* can not bargain " away the rights of the infant he represents, but he can assent " to such arrengements as will facilitate the determination of a " suit."

We take the liberty of using the whole of the quotation, and also that which follows, to show the connection in which the quotation *supra* was used.

" The Court whose duty it is to protect the interests of the " infant should see to it that they are not bargained away by those " assuming or appointed to represent him, but this rule does not " prevent a guardian *ad litem* or a *prochein amy* from assenting to " such arrangement as will facilitate the determination of the " case in which the rights of the infant are involved. There is " but one Supreme Court of Illinois, although for the convenience " of litigants it sits in different places in that State, and unless " the consent of parties is given can take cognizance when hold- " ing its session in a particular grand division only of cases aris- " ing in such division.

" But it is the same Court which sits in the respective divi- " sions, and a consent by the next friend or guardian *ad litem* " that a case be heard in a particular division could not possibly " prejudice the substantial rights of the infant. It is true that " the consent of the plaintiff's next friend and guardian *ad litem*, " that the case should go to the Central Grand Division brought it " to a more speedy hearing than it otherwise would have had if " such consent had not been given. But certainly it was not to " the interest of the Plaintiff that the final determination of the " case should be delayed."

So that, when the Supreme Court says the " guardian *ad litem* may " assent to such arrangements as will facilitate the determination " of a suit," it does not mean that the guardian *ad litem* shall throw away the infants' rights in order to stop the litigation.

Even if it be true that the " Chancellor may order such a " disposition of the infants' property when the legal title to same " is in trustees, as he in the exercise of a sound legal discretion

"may deem most beneficial for the infants," and we do not question this doctrine when properly applied, yet we insist that this is no such case as Cochran vs. Van Sorley, 20 Wendall, p. 376, which Mr. Justice Collier cites as authority for affirming the District Court in its finding that the alleged sale of the Bent's property to Maxwell by the guardian *ad litem* was proper. In Cochran vs. Van Sorley the Court says: "It is a settled principle that "whenever the property of infants consists of real or personal "estate, the legal title to which is in trustees, the Chancellor, as "the general guardian and protector of the rights of all infants, "may authorize such a disposition thereof as he, in the exercise "of a sound legal discretion, may deem most beneficial to such infants." This much Mr. Justice Collier quotes, but to continue the language of the New York Court, and adding to the quotation *supra* the opinion reads: "The only restrictions upon that power "are those which the Court has from time to time imposed upon "itself in the nature of general rules to regulate the exercise of "such discretion, and those imposed by certain provisions of the "Revised Statutes rendering Trustees incapable of transferring "the title to trust estates in contravention of the trust expressed "creating such estates."

"The same power is given to the Chancellor over the legal "estate of infants by the several Acts in relation to the sale of "infants' estates, subject, however, to the limitation imposed by "the legislature that such estates shall not be sold or disposed of "contrary to the provisions of the will or conveyance by which "the estate was devised or granted to the infant."

So that it is clear the case at bar is not such a trust estate as that in Cochran vs. Van Sorley, for in that case the trust estate was one made so by a will; in this, one in which the persons holding the legal title were so holding it *ex malificio*, as it were. In that case the Court had under consideration the validity of sales made for the infants' maintenance—in this, it is an effort to establish the infant's title, and no sale was contemplated for any purpose, nor asked to be decreed by the Court.

We think the Court will hold that such an agreement as seems to have been entered into in this cause by those *sui juris* was altogether unauthorized and invalid to bind the infants, and the only question remaining is whether or not the conveyance of the property and the entering of the decree of September, 1866, are such errors as this Court will allow to stand as against those who were unable to protect themselves?

The decree of September, 1866 (p. 73 of the Record), of itself shows that it was entered for the purpose of carrying out the agreement which had been made.

There was absolutely nothing in the case which looked to a sale of the property, and although a sale was not contemplated by the pleadings, we would not have questioned the validity of the

so-called consent decree, made to carry out the compromise, had all the parties interested been competent to act, but it certainly will not be contended on the part of the appellees that a consent decree would have been proper had the infants acted in their own behalf, or had the guardian *ad litem* consented for them, how much less then can they contend that the decree is without error which does not show who consented for them, and when as a matter of fact there is absolutely no person having the power to consent?

We further insist that the District Court acted with no legal judicial discretion in permitting the decree of September, 1866, to be entered, but was actuated solely by the alleged consent and agreement of the parties.

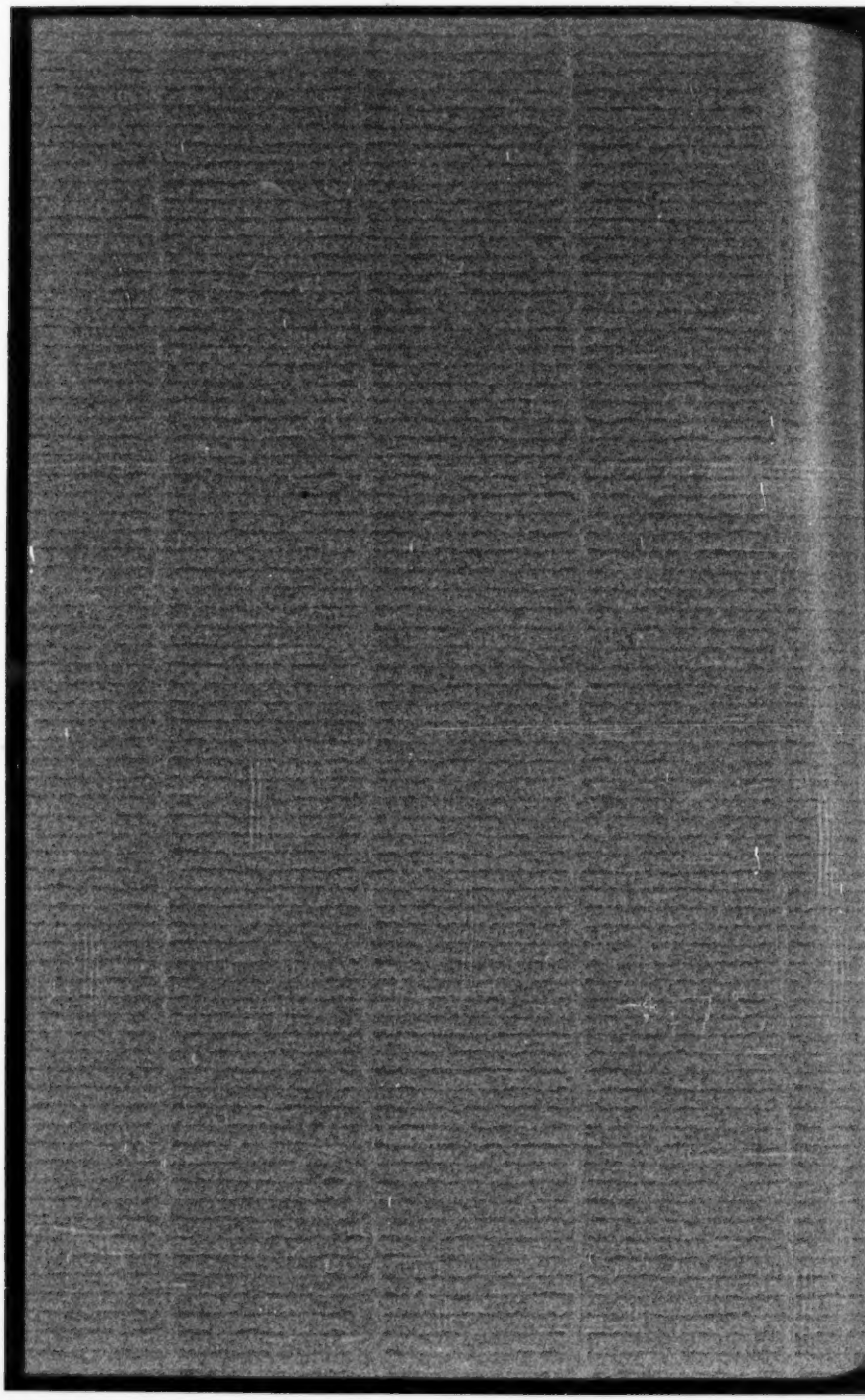
That the Bents were entitled to the legal estate as adjudged to them by the decree of June 3rd, 1865, cannot be questioned, and while the Court, it is claimed, had the right to set aside that order at any time while the suit was pending, we claim that it could be done, not capriciously, but only if the Court discovered itself to have been in error; if the Bents were entitled to a legal estate in June, 1865, nothing had appeared in the record to show that they were not so entitled in May, 1866, nor in September, 1866. Will it be contended that the discretion of the Court was exercised in converting a legal title into an equitable claim in order that a compromise might be carried out, and especially so when the decree establishing the legal title followed the purpose of the action and the decree carrying out the compromise and vitally affecting the interests of the infants, was in no wise contemplated by the pleadings? We think the language used by the Court in the case of Taylor vs. The Franklin Savings Bank *supra* is applicable here. "The Court was led into making an inequitable decree by the unauthorized agreement of the guardian *ad litem*," excepting the fact that it cannot even be claimed that the guardian *ad litem* in case at bar consented to the decree. There is absolutely nothing in the record to show that the Court had any concern for the interests of the infants, but on the contrary there is an utter disregard of them. There was no provision for the protection of the infants by having the money paid for their interest,—there was no provision for their protection in securing the money for their benefit after it was paid. If the money was to be paid to Guadalupe Bent as guardian *ad litem* there was no bond required of her, none had been provided by her, and as a matter of fact neither the guardian *ad litem* nor any other person was authorized to accept the money if it should be tendered. There was no investigation by the Court of the value of the infants' interests, no exposure of same to public vendue whereby the best price could have been obtained, but the decree is for the sale of the interest to a litigant who had been resisting the claim of the Complainants from the inception of the cause, and whose whole

interest and purpose was directed toward acquiring that interest.

A reversal of the cause is respectfully asked, and if same should be granted, the other cause, Guadalupe Thompson, administratrix re. vs. The Maxwell Land Grant and Railway Co. &c., No. 387 must follow as a matter of course.

S. D. Rouse,
For Appellants.

John G. Carlisle,
James O'Hara,
Caldwell Yeaman,
E. T. Wells,
R. T. McNeal,
John G. Taylor,
Of Counsel.



—IN THE—

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

GENERAL NO. 16109: TERM NO. 90.

GUADALUPE THOMPSON, Administratrix of the ESTATE OF ALFRED BENT, Deceased, GEORGE THOMPSON, her Husband, CHARLES BENT, JULIAN BENT, and ALBERTO SILAS BENT,
Defendants and Appellants,

vs.

The MAXWELL LAND GRANT AND RAILWAY COMPANY, and L. B. MAXWELL,
Complainants and Appellees.

Appeal from the Supreme Court of the Territory of New Mexico.

BRIEF AND ARGUMENT OF APPELLANTS

Statement of the Case and History of the Litigation.

While the subject of this controversy is a Mexican land grant, neither the validity of the

grant, the correctness of its survey, nor the regularity or effect of the confirmation by congress is made a question. Complainants and appellees claim title to the entire grant by purchase, and defendants and appellants, Charles, Julian, and Alberto Silas Bent, to an undivided one-twelfth part of it by inheritance from their father Alfred Bent.

The controversy, in one phase or another, is of long standing, and has an interesting history. Under its policy of making grants of large bodies of land to private persons as a means of inviting settlers and encouraging the development of the country, the republic of Mexico, in 1841, made a grant to Charles Beaubien and Guadalupe Miranda, of the lands in controversy, for many years known as the Beaubien and Miranda grant, but for the last quarter of a century as the Maxwell land grant. It includes nearly 2,000,000 acres of the most valuable lands in the territory of New Mexico.

In September, 1859, the heirs of Charles Bent, viz. Alfred Bent and his two sisters, Teresena Scheurick and Estefana Hicklin, to establish their claim, instituted suit in the District court for the county of Taos, against the said Beaubien and Miranda and Lucien B. Maxwell, the latter having in the meantime acquired an interest in the grant from the original grantees or their heirs. The bill alleged in substance that the father of complainants, at the time of his death, was equally interested with Beaubien and Miranda in the ownership of the

grant, and prayed that their interest be established and decreed to them, and that it be also set off to them by partition. The court afterwards, in June, 1865, upon the pleadings and proofs, decreed them an undivided one-fourth part of the grant, and appointed commissioners to make partition, giving specific directions for their guidance. In December following, and before the commissioners had acted, Alfred Bent, one of the complainants in that suit died, and at the following April term of the court appellants Charles, Julian and Alberto Silas, his infant children and heirs, were substituted as complainants in the suit instead of their father; and a few days later a further order was entered appointing their mother, Guadalupe Bent, guardian *ad litem* and commissioner for said minors, with power to execute deeds or carry into execution all sales or transfers of their interest to said Maxwell. A few weeks later, on May 3, 1866, Mrs. Bent, as such guardian *ad litem*, and reciting this order as her authority, undertook to convey to said Maxwell, for the consideration of $6,000, the undivided one-twelfth of the said grant inherited by them from their father. At the next term of the court, about four months after the execution and delivery of this deed, and on September 10, 1866, a further order was entered in said cause, reciting the making of a "mutual agreement" between the parties "settling and determining all the equities" in the case, whereby it was "decreed by the mutual consent

and agreement" of the parties that the decree of June, 1865, establishing the interest of the complainants in the grant and directing that it be set off to them, "together with all orders made under and by virtue of the same, be set aside;" and by like recited consent it was further ordered that Lucien B. Maxwell pay to the complainants in the cause $18,000, one-third each to Teresena Scheurick and Estefana Hicklin, "and to Charles Bent, Julian Bent and Alberto Silas Bent, the children and heirs of Alfred Bent" the other third, or $6,000, and that said Scheurick and wife, Hicklin and wife and Guadalupe Bent, guardian *ad litem*, within ten days make conveyance of all their right, title and interest in the said grant to said Maxwell. Nothing was ever done under this last order, all the parties having executed and delivered deeds to Maxwell in the previous May.

Following these proceedings, and about April, 1870, L. B. Maxwell, having in the meantime acquired from Beaubien and Miranda, or their heirs, their remaining interest in the grant, undertook to sell and convey to the Maxwell Land Grant & Railway company, for the consideration of $1,350,000, the entire grant, reserving the home ranch of about 1,000, acres containing the improvements, together with some mining claims, and also excepting from the conveyance a few thousand acres which he had before conveyed to other parties. An abstract of the pleadings will sufficiently disclose the

other facts necessary to a comprehension of the case.

The Maxwell Company's Original Bill in this Suit.

In August, 1870, L. B. Maxwell and the Maxwell company, recognizing the irregularities and insufficiency of the proceedings taken to acquire the title to that portion of the grant held by Alfred Bent at the time of his death, filed in the District court of Colfax county, in which at that time the greater part of the grant lay, their original bill against appellants, Guadalupe Thompson and her husband, (Mrs. Bent in the meantime intermarried with George W. Thompson), and Charles, Julian and Alberto Silas Bent. After setting out the making of the grant and its confirmation by act of congress, the conveyance of the greater part of it to the Maxwell company, the institution of the suit by the heirs of Charles Bent in 1859 and the loss of the pleadings, the bill alleges that on May 29, 1865 (June 3, in fact), a decree was entered in that suit decreeing to said heirs an undivided fourth part of the said grant and an order directing partition thereof. That after said decree, and before steps had been taken to make such partition, the complainants in that suit, in the lifetime of Alfred Bent, by way of a compromise of what was regarded as a doubtful and uncertain

claim, entered into an agreement with said Maxwell to convey their interest to him for $18,000; that before this agreement could be executed said Alfred Bent died in December, 1865; that his death was suggested at the following April term of court and his infant children and heirs aforesaid were substituted as co-complainants, and their mother Guadalupe was appointed their guardian *ad litem* and commissioner to sell and convey their interests, etc.; that thereupon a decree was made upon consent of solicitors of the parties, setting aside the decree of June, 1865, and ordering conveyance to be made by said guardian *ad litem* to L. B. Maxwell; that said Guadalupe undertook by deed, dated May 3, 1866, to convey said interest, and that said Maxwell had paid the said consideration. It is then alleged that this last order or decree (which was in fact made September 10, 1866) setting aside the previous decree, was without jurisdiction, and that some of its directions as to the conveyance of the interests of the minor heirs of Alfred Bent and making payments therefor, were irregular; that instead of the agreement for the conveyance having been made by them as recited in said order, it was in fact made by their father in his lifetime; that instead of ordering the purchase money paid to the guardian *ad litem* of said minors, it should have been directed to be paid to the personal representatives of said Alfred, and that in fact payment had been made to said Guadalupe Bent as adminis-

tratrix; that the court had no jurisdiction to order a conveyance of the interest of said minors. It is then declared that by reason of the aforesaid irregularities and void decree, it is doubtful in law whether, as against the said minor children and heirs of said Alfred Bent, it sufficiently appears that they have no equitable or other interest in the said premises, and that such doubt creates a cloud upon the complainants' title, etc. A decree is therefore prayed that the trust in favor of said infants be extinguished, and that complainants be decreed to hold the premises free from claims by them, etc. To this bill are annexed copies of Maxwell's deed to the Maxwell company, the decree of June, 1865, orders of April and decree of September, 1866, and the deeds made by said Guadalupe and her husband's sisters, together with all the pleadings in the original suit by Charles Bent's heirs, all of which are prayed to be taken as part of the bill.

Answer of Defendants.

Guadalupe Thompson and her husband George W. Thompson answered denying that Alfred Bent at any time was a party to the alleged agreement to convey his interest in said grant to said Maxwell, and as to the proceedings in the District court at the April and September terms, 1866, without admitting their validity, they protest against the same as illegal, unjust and void as to the said

minor children of Alfred Bent, and deny that their title was thereby divested; and aver that said Guadalupe was wholly ignorant of her duties as guardian *ad litem* of her minor children, and wholly ignorant of their rights in the premises; but as to whether the interest of said Alfred Bent and his minor heirs was terminated and extinguished being questions of law, they are not competent to answer, but are advised that the supposed deed of said Guadalupe was illegal and void as to said minors; deny that $6,000 have passed to said Guadalupe from said Maxwell, but admits a portion may have so passed, but whether it passed to her as administratrix or guardian *ad litem* she is and was at the time wholly ignorant.

The answer of said minors Charles, Julian and Alberto Silas Bent, by George Boyles their guardian *ad litem*, avers that they are infants of the age of 11, 9 and 7 years respectively, and as such submit their interests to the protection of the court, praying strict proof of the allegations of complainants' bill.

Decrees Entered and Reversed under Original bill and Answers.

In September, 1873, on the pleadings and proofs, the said District court entered a decree in favor of complainants which set aside as erroneous the decree of September 10, 1866, assuming to vacate

the original decree of June, 1865, in favor of Charles Bent's heirs, and directing a conveyance of their interest in the grant to Maxwell. But notwithstanding the order directing such conveyance to be made was set aside as void, and the proof negatived the allegations of the bill that Alfred Bent in his lifetime made the alleged agreement of sale, the attempted conveyance was sustained as a transfer of the interest of said minors; and it was decreed that the premises were held by the Maxwell company discharged of all right, title or interest of the defendants. The territorial Supreme court at its January term, 1874, affirmed this judgment, but on appeal to this court at its October term, 1877, the judgment was reversed on the ground that complainants "failed to substantiate the main fact relied upon by them, viz. that the agreement for a compromise was concluded with Alfred Bent in his lifetime." It is further declared that the complainants' bill, being essentially a bill of review to set aside a consent decree, could not for that reason be maintained (95 U. S. 391).

Complainants' Amended Bill after Reversal of the Decree in their Favor.

The cause having been remanded by this court to the territorial court, with directions that complainants be allowed to amend their complaint as they might be advised, with liberty to defendants

to answer new matter, etc. complainants in March, 1880, filed their amended bill wholly changing their position. The amendments were almost entirely by elimination, striking out the allegation that Alfred Bent in his lifetime made with Maxwell the alleged agreement to convey, together with all allegations, general or specific, as to the errors and irregularities of the decree of September 10, 1866; and upon such different and inconsistent state of facts the same relief is asked as in the original bill, viz. that they be decreed to hold the premises discharged from all right, title or claim by defendants.

Before the issues were fully made, the bill was further amended by the suggestion of the death of L. B. Maxwell, and the averment that before his death he had conveyed his remaining interest in the grant to the Maxwell company, whereby that company became sole complainant.

Amended Answer of Defendants to Complainants' Amended Bill.

To complainants transformed pleading defendants and appellants in March, 1880, filed their joint and several answer. In their answer to the original bill defendants denied that Beaubien and Miranda had maintained quiet and peaceable possession, and that Maxwell and his wife had become the sole owners. These and some other denials

and many admissions of facts, which do not affect the case, are repeated in this answer. Then follow other averments and denials which were considered by defendants as answers to the amended bill, which, except in its prayer, is essentially a new complaint and a new cause of action. This portion of the answer denies that Alfred Bent in his lifetime, or either of the defendants, had ever been a party to the alleged agreement for the sale of their interest, or that their rights after the decree of June, 1865, had been regarded as doubtful or uncertain; avers that the proceedings set forth and relied on in the complaint as divesting their title were illegal and void as to said infant defendants; denies that the alleged consent decree of September 10, 1866, was made at the request or with the consent of said infants, or any one authorized to act for them; avers that the interest sought to be acquired for $6,000 was worth at the time $100,000 or more, and that the alleged settlement was in no way advantageous to them or necessary to their maintenance; denies that the sum of $6,000 had been paid to Guadalupe Thompson; admits that about $1,000 had been paid, but denies that any part of it had been received by the infant defendants, and offering to refund it if it should appear on the hearing that any one with authority to act for them had received any part of said sum; and avers that the deed from Guadalupe had been procured by fraudulent representations upon the part

of Maxwell; avers that the decree of September 10, 1866, setting aside the decree establishing the rights of their father, was obtained by fraud and deceitful practices upon the part of Maxwell: denies that complainants are entitled to hold said grant discharged of any right or title of the said infant children of Alfred Bent.

To these portions of the answer complainants filed exceptions.

Separate Answer of Charles Bent.

Charles Bent having attained his majority, in March, 1882, filed his separate answer, in which he denies the exclusive quiet possession of the grant by complainants; or that by any means Maxwell had ever become the owner of the whole of said grant; or that the pleadings in the suit of Alfred Bent and others were lost or destroyed as alleged; avers that by the terms of the decree of 1865 an undivided one-fourth of said grant was confirmed to Alfred Bent and other heirs of Charles Bent, with right to possess and enjoy the same; that false representations were made to the sisters of said Alfred Bent and their husbands by Maxwell as to the extent and character of the grant, as a means of procuring the conveyance of their interests; admitting the making of the deed of May 3d, 1866, by Guadalupe Bent; avers she was a Mexican woman when appointed guardian *ad litem*, and at the time of making said

deed and the entry of the decree of September 10th, 1866, unable to speak, write or understand the English language, unfamiliar with business or proceedings of courts, and unacquainted with the rights of her children in the premises or her duties as guardian *ad litem*, as also with the bounds, character and value of said grant and of the decree establishing the rights of the said parties in said grant, or of the share or part claimed by her husband; that she was accustomed to consult and rely on said Scheurick, who professed friendship for herself and her children, and a desire to protect their interests, by reason whereof she reposed special trust in him; that she and said Scheurick had long known said Maxwell to be a man of great wealth and influence, and that he had knowledge of her ignorance, weakness and inexperience, and of her want of information as to the extent and value of the grant and of the decree establishing the rights of the said Alfred and his sisters; that said Maxwell caused and procured her appointment as guardian *ad litem*, and procured the pretended conveyance; that said Maxwell caused said Scheurick to believe, and represent to her, that said grant was of but little value except for grazing, and contained but little or no mineral; that it extended only to the New Mexico line, and that owning the greater part thereof said Maxwell would control the whole and exclude her children from all share in it; and said Maxwell also caused the said Scheurick to represent to her that she was author-

ized to sell and convey their interest, and unless she should accept the said $6,000 therefor, neither she nor her children would ever realize anything therefrom; and, moved by these considerations, she made the pretended conveyance; that the contents of the deed were not made known to her; that it was made without advice of counsel; that the said Maxwell did not pay to her, or any other person for her, at the time nor since, the said $6,000, or any sum of money whatsoever; that the grant contains about 2,000,000 acres, and abounds in valuable minerals, a large extent of well-watered, irrigable lands, and extensive forests of timber, the residue being very valuable for grazing; that about 200,000 acres of said grant in fact lay in Colorado; that the interest of said infants on May 3, 1866, was reasonably worth $100,000 or more, and has since been appreciating in value. All of which on information, etc was known to said Maxwell when he procured said pretended conveyance.

It is further averred, on information and belief, that said Alfred Bent left a considerable estate other than said grant, consisting of houses, lands, moneys and personal property, from which their mother then, and always afterward, was well able to maintain and educate her said children; that there was no necessity for the sale of their interest in said grant; denies on information, etc. that said Guadalupe Bent, or any solicitor representing her said infant children, ever requested or consented to the

setting aside of the decree establishing the right of said Alfred Bent and his sisters; that said decree of September, 1866, was procured in the absence of, and without notice to, said Guadalupe, and by false representations of said Maxwell or some other person; that the facts herein stated touching the ignorance and weakness of said Guadalupe, and the impositions practiced upon her, the extent and value of said grant and the estate left by said Alfred, and the sufficiency thereof to maintain and educate said children, were concealed from said court; that the said decree was obtained by false representations and concealment aforesaid; that there was no reference to a master or inquiry as to whether said decree would be beneficial to said infants; avers that by said decree (of June, 1865,) the said Alfred Bent became fully seized of and entitled to an undivided one-twelfth part of said grant, and his heirs are entitled now to have it set off to them; that by the amended bill it appears that plaintiffs have no title to the relief demanded, neither has the court jurisdiction to grant the relief, and defendant craves the same benefit of this defense as if he had demurred. To all of the foregoing portions of the separate answer of Charles Bent, complainants also filed exceptions.

Exception to Answers Sustained, and Appeal.

The court sustained all these exceptions, both to the joint and several answer of defendants and

to Charles Bent's separate answer; and having practically stricken out their defense, the District court entered judgment against them, from which an appeal was taken to the Supreme court of the territory, where the judgment was reversed and the portions of both answers stricken out by the lower court were ordered restored.

Thompson *et al* vs. M. L. G. & Ry. Co. 6 Pac. Rep. 193.

Final Hearing in District Court and Decree for Complainants.

Testimony was then taken under the issues thus formed, and the cause having been before submitted to the District court and taken under advisement, his Honor James A. O'Brien, presiding judge, in May, 1893, entered a decree for complainants, declaring that the premises were held by the Maxwell Land Grant & Railway company, free from any claim of defendants. An appeal was again taken by defendants to the Supreme court of the territory, where a judgment of affirmance was entered in July, 1895, from which this appeal is prosecuted.

Findings of Fact by Territorial Supreme Court.

The findings of fact made by the territorial Supreme court are set out at pages 103-33 of the printed record. They include a copy of the bill

filed by the heirs of Charles Bent in September, 1859, setting up the interest of their deceased father in the grant, their heirship, etc. and praying that their interest be established, and that it be set off to them by partition when established; the overruling of demurrers to the bill; also copies of the several answers made to the bill by defendants Beaubien, Miranda, Maxwell and Joseph Pley, a grantee of Maxwell of a small part of the property; a copy of the decree rendered June 3, 1865, the substantial parts of which have already been stated. It is found that the evidence upon which the decree was based does not appear in the record, but that the decree recites the cause was heard on the pleadings and testimony on file, the pleadings alone having been found since the institution of this suit by the Maxwell company in 1870; that the commissioners appointed by that decree never acted; that Maxwell declared he would appeal that cause and, if necessary, carry it to the Supreme Court of the United States; that afterwards the heirs of Charles Bent entered into negotiations for a compromise on the basis of Maxwell paying them a money consideration to relinquish their claim; that it was understood that either Alfred Bent or Scheurick or both should act as agents to sell Maxwell their interests in the grant for the best price they could get, but not less than $21,000 or what Beaubien's heirs got; that in September or October, 1865, Alfred Bent, acting for

himself and his sisters, went to Maxwell's residence to try and make a sale of their interest; that Judge Houghton, one of the counsel whom Alfred Bent consulted, told him he had better settle than take the award of the commissioners; that Bent demanded $21,000 and Maxwell offered $18,000; that Bent returned to his home without having effected an agreement with Maxwell as to the price; that the Bents considered the sale as good as made, but Alfred Bent said they could get a few thousand dollars more by being quiet a few days; they were expecting to close the bargain in a few days deeds having already been written out by Scheurick, husband of Teresena Bent; that before anything was done Alfred Bent died in December, 1865, leaving a widow Guadalupe and three children, Charles, Julian and Alberto Silas, aged respectively 6, 4 and 1 year; that on April 12, 1866, Guadalupe was appointed administratrix of Alfred's estate and qualified; that a few hours before Alfred Bent was shot, on December 3, 1865, he directed one of the commissioners to proceed with the partition, saying he considered his and his sisters' interest worth $150,000.

It is further found that Alfred Bent left a will which, with the record of probate, is set out in full in the findings, the devising words of which are "I give and bequeath unto my wife Guadalupe Long Bent, for the maintenance of her and my three children, Charles, Julian and Silas Bent, all of my real

and personal property, money, goods and effects." In this connection is also set out a copy of the inventory of Alfred Bent's estate, filed 6th day of March, 1867, showing an estate valued at about $12,000, also proof of debts against said estate to the amount of about $1,800. The court then finds this will and accompanying proceedings were not introduced in evidence till the close of the testimony by the Maxwell company in 1886, and after the decision of Thompson vs. Maxwell, 3 N. M. 269.

It is further found that Beaubien left six children and that Maxwell married one of them, and purchased the interest of the others in the grant for not over $3,500 per share, between April, 1864, and January, 1870, all the said vendors or their husbands, as well as Alfred Bent and his sister's husbands, being farmers, merchants or stock raisers and intelligent men, Scheurick and Hicklin being considered men of wealth and influence; sets out a copy of the order of the District court, April 9, 1866, substituting for Alfred Bent his three minor children Charles, Julian and Alberto Silas, as co-complainants with the other heirs of Charles Bent in the suit, and a copy of the further order made two days later as to the appointment of Guadalupe Bent guardian *ad litem* and commissioner for said minor children to convey their interest in the grant, and continuing the cause to the next term. It is then found that both of these orders were made at the instance and in accordance with the wish

of Maxwell or his counsel as necessary to the validity of the conveyance; that the negotiations interrupted by the death of Alfred Bent had been resumed, the Bent heirs being represented by Aloys Scheurick; that a settlement was concluded which was satisfactory to the parties, and by which Maxwell was to pay $18,000 for a conveyance of their interests, the same being advised by Merrill Ashurst, leading counsel for them, the ground of his advice not being stated; that Scheurick and the others did not consider their claim after the decree of 1865 as doubtful or uncertain, one of the reasons for the settlement being that the suit might drag on a long time, Maxwell having said to Scheurick that he had the means and would out-law them, putting it off from court to court, having also some time before told Scheurick he had paid his attorney $1,000 to put the case off for six months. The findings include a copy of the deed dated May 3, 1866, by Guadalupe Bent as guardian *ad litem* of her children, for the conveyance of their undivided one-twelfth interest in the grant, and warranting their title thereto, for the consideration of $6,000 cash in hand, reciting in *haec verba*, as her authority, the before-mentioned order of April, 1866, appointing her guardian *ad litem*, commissioner, etc. It is then found by the court that this deed was prepared by Maxwell's counsel, and that no other conveyance was made by Guadalupe Bent; that Alfred Bent's two sisters and their husbands executed to Maxwell similar convey-

ances about the same time, each for the consideration of $6,000.

It is then found that afterwards and at the September term, 1866, of the District court a decree was entered in said cause, a copy of which is set out in full, which has already been referred to as the decree of September 10, 1866. This order or decree, after referring to the decree of June, 1865, and reciting that partition under it had not been made, and that an agreement had been made determining all the equities under it, proceeds:

"It is therefore ordered, adjudged and decreed by the mutual consent and agreement of said complainants, as well as the said defendants in this cause that the interlocutory decree above mentioned, together with all orders made under and by virtue of the same, be set aside; and by mutual consent and agreement of said parties it is hereby further ordered, adjudged and decreed that the said Lucien B. Maxwell, one of the defendants in this cause, pay to the said complainants the sum of $18,000, to be divided among them, [one-third each to Scheurick and wife and Hicklin and wife], * * * to Charles Bent, Julian Bent and Alberto Silas Bent, the children and heirs of Alfred Bent, the remaining third part to be equally divided among the last named and to be paid into the hands of Guadalupe Bent, widow of the said Alfred Bent, deceased, and guardian *ad litem* for said children for the purposes of said division.

"And upon the further consent and agreement of the said parties it is hereby further ordered, adjudged and decreed that the said [Scheurick and wife and Hicklin and wife and] Guadalupe Bent, guardian *ad litem* for Charles Bent, Julian Bent and Alberto Silas Bent, children and minor heirs of the said Alfred, deceased, within ten days from the day of the date of this decree make, execute and deliver to said Lucien B. Maxwell good and sufficient deeds of conveyance of all their right, title, interest, estate, claim and demand of, in and to the lands in controversy in this cause."

It is further found that the foregoing order or decree was not made by the personal procurement, knowledge or conssnt of said Scheurick or Guadalupe Bent, and that the fact of its entry was unknown to them till several years thereafter; that no pleadings, orders, or proceedings other than those recited appear in the record in said cause; that the record does not show whether or not any inquiry was made by the court or by its authority touching the value of the said premises or the interest of the said infants therein, or as to the necessity of disposing of the same, or as to the other estate of said infants or the ability of the mother to educate and maintain them, or touching the propriety, necessity or advisability of such sale and conveyance of their interest, nor does there appear of record any motion, petition or showing

against the propriety of the original decree vacated by said decree of September, 1866.

It is further found that the grant contains about 1,700,000 acres, that part lying in New Mexico embracing some of the best and most valuable lands in the territory, including large areas of grazing and tillable lands, and is traversed by several streams furnishing water for irrigation, a small part of which was cultivated in May, 1866; that it also contains large bodies of timber and was known in May, 1866, to contain considerable coal deposits, and was then believed and has since proven to have considerable deposits of precious metals, including gold and silver; that at that time, and for several years after, there was no such demand for or sales of undivided interests in lands of the quantity, character and location of these as to create an ascertainable market value; that from the testimony it is impossible to satisfactorily fix a market value in 1866, opinions of witnesses varying from 2 1-2 cents to $1.25 per acre, its value being largely speculative for the future.

It is further found that said Guadalupe Bent is a Mexican woman, and in May, 1866, was unable to read, write or speak the English language, and unfamiliar with her duties as guardian *ad litem*; that she was without knowledge of the boundaries, extent, character or value of the grant or the act of congress confirming it, or of the particulars of the decree of June, 1865; that Maxwell represented to

Scheurick that the grant was not as large as it was supposed to be; that it did not extend into Colorado or beyond Red river, when it did so extend over 200,000 acres; that said Scheurick and Guadalupe Bent believed and were influenced by those representations; that said Maxwell, while generous and magnanimous in many respects, was unscrupulous and tyrannical, and a resolute and determined man, and at that time a man of large wealth and great power and influence throughout the country and territory, as was known to said Guadalupe Bent, and he exercised his power and influence in such way that the weak feared to oppose him in matters of personal concern; that Guadalupe Bent was influenced in part in executing said conveyance by this known character of Maxwell; that he made threats that unless the Bent heirs accepted $18,000 for their claims they would never get anything, and that no one should occupy any part of his grant, and these threats were communicated to her and influenced her in making the said conveyance to him; that the conveyance was in the English language and was never interpreted or read to her.

But it is further found that it appears the means of knowledge of the extent and value of said grant were open to the Bent heirs and their counsel; that the boundary between Colorado and New Mexico was not then definitely known; that Guadalupe Bent acted in concert with the other adult

parties who dealt with their own interests on the same terms, and she was willing to make the same settlement that they did; that Scheurick and counsel for the Bent heirs could read and write both the English and Spanish languages; that when Guadalupe Bent executed the deed to Maxwell she understood there had been a settlement with him by which the interest of the Bent heirs were to be transferred for $18,000; that she understood that the document was a transfer to Maxwell of the interest which had belonged to her husband; that the settlement was satisfactory to her; that she supposed the document had been arranged by Scheurick with Maxwell; that she had relied on Scheurick and was willing to do as he thought best; that she believed she had authority to convey and intended by the deed to convey to Maxwell the interest in the grant which had belonged to her husband; and the court finds that no fraud, imposition or error has been shown to have entered into said transaction or to have brought about said compromise decree.

It is found that no money was paid by Maxwell to any of the parties at the time they made their deeds, and that instead notes were given payable one year from date; that Guadalupe Bent received a note for something over $5,000; that at the beginning of this suit a considerable sum not definitely ascertained remained unpaid on this note; that Guadalupe delivered it to her husband George W. Thompson with her other property when she

married him, about thirteen months after her husband's death; that it does not appear that any part of the proceeds of the note was paid to the children of Alfred Bent or their mother, but said Thompson maintained and educated them during their minority after he married their mother, with the funds of his wife and himself, the same as his own children, keeping no account; that upon the execution and delivery of the deed by Guadalupe Bent May 3, 1866, Scheurick and his wife assumed for complainants in said original suit payment of the fees of counsel therein and paid the same, *pro rata* amount being deducted from the notes given said Guadalupe Bent and Mrs. Hicklin; that there is no evidence that such counsel or other counsel were afterwards retained by Scheurick or other of the complainants, and the record of said decree of September, 1866, does not disclose what attorney appeared or assumed to appear for complainants and consented to making said order.

It is further and finally found that the inventory before referred to and set out shows that, excluding real estate and the note of L. B. Maxwell (for $5,000), the total assets of the estate were $1,408, and the debts mentioned in the will, with additional claims allowed, amounted to $2,425, but witnesses familiar with said Bent's affairs testify that at his death he had both real and personal property other than that mentioned, both in New Mexico and in Colorado.

Opinion of the Territorial Supreme Court.

The opinion of the Supreme court of the territory in support of its judgment affirming the decree in favor of complainants and appellees, appears in the record at page 136. This opinion is very brief and does not attempt to give the grounds of the judgment, but refers to the decision in another cause decided at the same term (Charles Bent *et al.* vs. Guadalupe Miranda *et al.*) in which these defendants and appellants are complainants, and these appellees and others are defendants, in which an opinion is filed setting forth the particular grounds of the court's decision. Substantially the same questions both of law and fact are presented in both cases and by stipulation both were submitted together in the District and in the Supreme court. By their bill in the other suit the children and heirs of Alfred Bent seek the vacation of the order or decree of the District court entered September 10, 1866, the cancellation of the deed by their mother Guadalupe Bent of May 3, 1866, and the enforcement, to the extent of their interests in it, of the decree of June, 1865, establishing their father's interest and directing it to be partitioned. The judgment of the territorial court in that suit was also adverse to them, from which an appeal is pending in this court, and stands for hearing at this time, being No. of this term. The opinion to which reference is made appears in the

printed record of the other case at pages 81-6, and we suppose should be considered in determining this appeal.

Justice Collier, who writes the opinion in the other case, places the judgment of the court upon these grounds: (1). That the decree of June, 1865 was interlocutory and was therefore subject to the control of the court in 1866, and could be vacated without depriving the infant heirs of Alfred Bent of any legal rights. (2). That the decree of September 10, 1866, was a mere modification of the decree of June, 1865; "that is to say, so far as the adult complainants were concerned it was entirely abrogated, and so far as the infants were affected, it dismissed only the partition part of the former decree, even if it did that much." (3). That the decree of June, 1865, being interlocutory and nothing being *res judicata* under it, the complainants in whose favor that decree had passed had nothing more (if anything) than an equitable estate in the premises. (4). That the interest of the infant complainants in that suit being a mere equitable right, a court of equity had the legal discretion and jurisdiction to dispose of it, if deemed for the best interests of the infants; and the fact that that decree is based upon consent, when the infants were incapable of giving consent, did not affect the discretion of the chancellor in the premises; nor does the recital in the decree of consent "operate to show it was based on that alone;" that it will be presumed

there was a reasonable exercise of discretion for the benefit of the minors. (5). That no fraud, imposition or error is shown to have entered into the transaction, though under the evidence taken since the decision of the court in Maxwell vs. Thompson, 96 U. S. the court cannot say the proofs support the conclusion that the terms of the compromise were advantageous to the infants.

ASSIGNMENT OF ERRORS.

And the said Guadalupe Thompson, administratrix; George Thompson, Charles Bent, Alberto Silas Bent, and Julian Bent, come now and say that in the record and proceedings of the Supreme court of New Mexico and in the final decree of said Supreme court manifest error hath intervened in this to-wit:

I.

It appears by the record and proceedings aforesaid that the decree of the District court in and for the said county of Colfax was by the Supreme court of the said territory of New Mexico in all things affirmed, whereas the said decree given in the said District court in and for the said county of Colfax was erroneous and ought to have been reversed.

II.

Also in this, to wit, that the facts found and declared by the Supreme court of the territory of New Mexico are not sufficient to sustain the decree given in the Supreme court of the territory of New Mexico for the decree given in the District court of the

county of Colfax aforesaid, but, on the contrary thereof, upon the facts found by the Supreme court of the territory of New Mexico, the decree given in the District court in and for the county of Colfax, in said territory, in favor of the said appelles and against these appellants ought to have been reversed and declared for naught.

III.

That in and by the said record and proceedings it doth appear that by a certain final decree made and given in the District court in and for the county of Taos, in the territory of New Mexico, on the 3rd day of June, 1865, Alfred Bent, ancestor of the now defendants, and appellants Charles Bent, Alberto Silas Bent, Julian Bent, was vested with one undivided twelfth part and share in the premises named in the bill of complaint of the said appellees, plaintiffs in the District court of the said county of Colfax, and the decree afterwards, at the September term, 1866, given in the said District court in and for the county of Taos, assuming to vacate, annul, and set aside the final decree so given on the 3rd day of June, 1865, was and is erroneous and void as against appellants, and decree ought to have been given in the District court in and for the said county of Colfax dismissing the bill of complaint of the said appellees out of the said District court, whereas in and by the said record and proceedings it doth appear that final decree was given in the District court in and for the said county of Colfax in accord-

ance with the prayer in the complaint of the appellees, plaintiffs in the Distaict court of the said county of Coifax and by the decree given in the said Supreme court in the territory of New Mexico the final decree so given in the said District court in and for the county of Taos on the 3rd day of June, 1865, was declared to be interlocutory, and in and by the judgment, decree, and opinion of the Supreme court of the territory of New Mexico it was declared that the decree entered at the September term, 1866, of the District court in and for the said county of Taos, assuming to vacate, annul, and set aside the said former decree of that court on mere consent of parties, not showing or setting forth who assumed to represent or consent for the defendants and appellants herein in that behalf, and no evidence being heard touching the matter, was and is nevertheless effectual to vacate, annnl, and set aside such former decree in favor of plaintiff's ancestor, the said Alfred Bent.

Wherefore, for the errors aforesaid and the manifold other error in the said record and proceedings and in the decree of the said Supreme court of the territory of New Mexico appearing, the said Guadalupe Thompson, administratrix of the estate of Alfred Bent, deceased; George Thompson, her husband; Charles Bent, Alberto Silas Bent, and Julian Bent pray that the decree of the Supreme court of the territory of New Mexico and the decree given herein in the District court in and for the

county of Colfax may be reversed, annulled, and altogether held for naught, and that appellants be restored to all things which by virtue thereof they have lost, and they also pray that decree be given for their costs in this behalf expended.

ARGUMENT.

We submit, at the outset, that there cannot be evolved from this record any theory consistent with the principles of equity jurisprudence upon which this decree can be supported. Considered in its entirety, the proceeding has been a medley of inconsistencies and contradictions, for which it is no less remarkable than for the duration of the contest, and the fervor and persistency with which it has been waged. The bill, as originally brought, and under which the complainants secured their first decree, proceeded upon the theory that the orders of the court, through which their title had come, were in part without jurisdiction, and in all respects irregular and ineffectual to divest the title of the infant heirs of Alfred Bent. A fundamental error set forth was that the contract for the sale and conveyance of the interest decreed to Alfred Bent was by mistake treated as having been made by his children, when in fact it was made by himself just prior to his death. The theory of the bill, therefore, was

that Alfred Bent having made a contract of sale, and his representatives having actually received the purchase money and made a conveyance, these facts should be judicially ascertained, and a decree made that the title had passed by reason of such contract, conveyance and payment. The bill distinctly declared that the court had no jurisdiction to direct a conveyance by the guardian *ad litem* of the infant children of Alfred Bent, or to vacate the decree of June, 1865, establishing his rights. The decree entered in complainants' favor under this theory was reversed by this court, mainly on the ground that the proofs failed to sustain the material allegation that Alfred Bent made such a contract in his lifetime, and for the further reason that having consented to or procured these orders, that they could not afterwards maintain a bill to review or vacate them. The amended bill filed after the cause was remanded strikes out all averments as to the void and irregular character of the orders before assailed; and, instead of seeking to have them vacated as a cloud, now seems to set them up as a source of title. But, impliedly at least, there is yet a recognition of infirmity in these orders; for it is declared that complainants "are advised that in the proceedings in the suit aforesaid it is doubtful in law whether, as against said minor children and heirs of the said Alfred Bent, it sufficiently appears that they have no equitable or other interest in the premises." (Rec. p. 69, fol. 121). There is no averment or sug-

gestion, however, as to what or wherein this infirmity consists.

After setting forth the order of April 13, 1866, appointing Guadalupe Bent guardian *ad litem*, etc. it is alleged that "thereupon such proceedings were had" as is shown in what is designated as the consent decree, directing a sale and conveyance of the interest in question, and the vacation of the decree of June, 1865. The fact is, as disclosed by the exhibits to the amended bill, as well as by the findings of fact by the court, that this order was made about five months later than the other, and four months after the deed contemplated by the first order was made by the guardian *ad litem*. It was contended on the argument in the lower court that this order was probably intended to be entered at the same time, and as part of that of April 13th. But manifestly it was an after-thought of Maxwell's counsel who took leading parts in the comedy of errors then being enacted in connection with the acquisition of the title of Alfred Bent's children. This order bears no relation to, and has no connection with, the other, being distinct and disconnected from it by the express continuance of the cause on April 13th to the next term of the court. The last, or September, order was an evident recognition of the invalidity of the previous one as authority for the conveyance of the estate, and an attempt to authorize the making of another, and if that could not be secured, to destroy the rights the infants had in the grant, and

thereby vest Maxwell with complete title.

The deed made by Mrs. Bent, dated May 3, 1866, reciting the order appointing her guardian *ad litem*, etc. with "power to execute deeds or carry into effect all sales," had already conveyed the interest of her children, or it had not. If the former, the decree of September was wholly nugatory in its effect upon the title, for there was nothing for it to operate upon; and if the latter, the decree could not be relied on as a source of title. If the deed made under the first order did not convey the title (and complainant's original bill expressly declares it did not, and their amended bill does not assert it did) it was because Mrs. Bent's children had no capacity, and she no authority, to make such sale or conveyance. Nothing is said in the order of April 13th as to price or terms, or as to the necessity or propriety of such sale. A sale is not even directed, the order only assuming to empower the guardian *ad litem* to execute a deed or carry into effect contracts of sale already made, leaving the essential matters of price, terms, conditions and propriety of the sale to the supposed contract already made for her children, or to her discretion. If neither of these orders, by its own force, divested or authorized the transfer of the title, both combined did not; for, as we have seen, they are distinct in substance and widely separated in time. And if these orders are of doubtful interpretation or effect, whether by reason of their inapt language or the times when they were en-

tered, they should be construed most strongly against appellees; for the court expressly finds that the first two, the one entered April 11th, substituting the infant heirs of Alfred Bent as co-complainants, and the other April 13th, appointing Mrs. Bent guardian *ad litem*, etc. were entered in accordance with the wish of Maxwell or his counsel. (Rec. p. 125, fol. 226). And the last, or September, order, directing, by the recited consent of parties, a sale and conveyance for six thousand dollars, was entered without the knowledge, procurement or consent of either of the complainants in that suit. (Rec. p. 130, fol. 235). It further appears from the findings of fact that the relation of attorney and client between the heirs of Charles Bent and the attorneys who had before represented them, ceased at the time the deed was executed by Mrs. Bent, May 3, 1866, and that there is no evidence that they or other counsel were afterwards retained; and the bill alleges the consent was given by solicitors. (Rec. p. 68, fol.119). So that the consent recited was not only by counsel, but by counsel without authority to represent any of the plaintiffs in that suit. It is more than intimated, even by the amended bill, that the orders of the court and the deed by Mrs. Bent are not relied on as valid; for, after referring to them, it alleges "so far as the same could lawfully be done under and by virtue of the said orders," the deed of Mrs. Bent terminated the interest of Mrs. Bent's children in the premises.

The real basis for the claim that the interest was terminated seems to be the alleged fact that their share of the contract price had passed to them; for it is alleged that the said sum of six thousand dollars "has passed into the hands of the personal representatives of the said Alfred Bent," and that "the said agreement has been fully performed by said Lucien B. Maxwell, and complainants are *therefore* entitled to hold the premises free and discharged from said trust." (Rec. p. 69, fol. 121).

If, then, any theory be deducible from the bill it would seem to be this: That notwithstanding the incapacity of the infants to enter into the contract, or to consent to a decree affecting their interest, and although the orders of court were so irregular and invalid as to confer no authority on Mrs. Bent to contract for them, and her deed was therefore ineffectual to transfer their interest; yet, because this invalid and unauthorized contract had been executed by the making of a deed and the payment of the consideration, the title of the infants should be decreed to have passed, and that of the Maxwell company quieted against them. This allegation of payment, evidently deemed an important if not a pivotal one in the estimation of the counsel who drew the bill, is put in issue by the answers. And it is found by the court that no money whatever was paid at the time Mrs. Bent made the deed, only a note for about five thousand dollars being given; that at the time this suit was commenced a

considerable sum, not definitely ascertained, remained unpaid on the note; and that no part was paid to the children or their mother. (Rec. p. 134, fols. 238-9). The legal effect of these findings is not qualified by the further finding that Mrs. Bent afterwards delivered this note with other property to her second husband, whom she had married about a year after it was given, and that the children were brought up in his family as his own. Though not so stated in the bill, we may assume that the allegation of payment imports a payment in cash to some one authorized to receive it for the infants, and under legal responsibility to apply it to their use, otherwise it would be no payment at all. Payment under an order of court means cash and not a note. Surely it would not be sufficient to sustain this allegation to prove that Maxwell gave a note and ultimately paid a part, or even the entire amount, to a stranger to the note and to the transaction, who was under no responsibility to pay the money to the children. It is only by implication that it can be said from the findings that any part of the note had been paid to any one. Independently of the rule in equity that in such cases as this it is the duty of the purchaser to see that the purchase money is properly applied, or reaches the person whose benefit it is paid; (2 *Perry on Trusts*, §§ 790, 796), it is submitted that the proofs and findings palpably fail to sustain this material averment of the bill. Under the rule referred to

and the facts in this case, Maxwell was under special duty, not only to pay the consideration in cash, but to pay it to such person and under such conditions as would secure to the infant beneficiaries the use and enjoyment of it. Even if Mrs. Bent, under the terms of the order of May 13th appointing her guardian *ad litem* and commissioner, had been empowered to execute a valid deed, which is not claimed, she would not by virtue of that appointment have been authorized to receive payment for the interests conveyed, either by note or in cash. She was not the guardian of the children's estate, and could have excercised no authority and was under no legal responsibility as such. Maxwell surely had notice of all the facts which imposed upon him the duty to see that the children received the money; for under the findings of fact he conducted the negotiations and initiated and prosecuted the proceedings which gave rise to this litigation, and knew the utter helplessness of those whose interests he was seeking to acquire. He knew that they were not only in contemplation of law but in fact infants, the oldest being about six years of age and the youngest a mere babe. (Rec. p. 118, 213).

We submit that when Maxwell under such circumstances comes into a court of equity asking that an apparent title in those infants be declared divested because he has taken an ineffectual deed under irregular court proceedings, but has actually in good faith paid them for their interest, he should

at least make strict and clear proof, not only that the alleged consideration has been paid and fully paid, but that it was paid to one authorized to receive it and under legal responsibility to them to apply it to their use.

But it may be said that a consistent theory is not essential to a bill of this kind, and that it is sufficient if the proofs disclose a case entitling the complainants to have their title quieted. This seems to be the view of the territorial Supreme court,

For the Decree of September, 1866,

is treated as a sufficient basis for the judgment. It is declared in the opinion by Justice Collier that the court had plenary power to dispose of the interests of the appellants, and did so by that decree, and that this appears upon the face of the decree, taken in connection with the legal inferences to be drawn from it. And this, notwithstanding the record shows the basis of the decree was consent, and that the interest of infants was involved. No attempt is made to add to the record in that case, and no supplementary act is required to be done under the decree appealed from. In substance, it is held that the order, by force of its own terms, divested the title of the infants and transferred it to Maxwell. We submit that this estimate of the effect of the order will not bear scrutiny. The claim is that a court of equity not only has inherent power and authority to dispose of the interest of

infants in real estate, but because such disposition was ordered it must be presumed, and conclusively presumed, that the court judicially considered and determined that it was for the advantage of the infants that their interests should be disposed of on the terms named in the order. There is no recital in the decree that an application had been made to the court by anyone, authorized or unauthorized, for such a order; and it is expressly found in this suit that the record in that discloses no petition, pleading or motion of any kind assailing the original decree or asking any other order in the case. (Rec. p. 130, fol. 235). The order was made in a suit brought to establish the title of Bent's heirs to an interest in the grant, and this result had already been achieved when the order was entered, which not only attempts to set aside this adjudication in their favor, but requires them to convey the interest decreed to them. Had a suit been instituted by the guardian of the estate of these infants, representing that the estate was liable to be lost or wasted, or that the sale was necessary to their maintenance and education, and setting forth its value and asking authority to sell it for such a price, a very different question would be presented, both as to the jurisdiction of the court and the presumption that proofs were heard and that it was found to be to the advantage, or necessary to the support of the infants, that a sale should be made. But there was no such proceeding, and no such representation,

Nor is there any other basis for the judgment than the recited consent of the parties. There is no intimation that there was a previous inquiry, or that there was any finding that it was for their advantage that their interest should be sold at all or at any price. Conceding, for the moment, that without statutory authority a court of equity has inherent jurisdiction to order the sale of real estate of infants when it is necessary for their maintenance, or when it is to their advantage for some other reason, we submit that this jurisdiction does not exist and cannot be exercised until a proper proceeding has been instituted and the facts which call for the exercise of the jurisdiction have been presented to the court in a pleading or petition by some one taking responsibility therefor. It will not be contended we suppose that without a proceeding instituted for that purpose, in which the necessary facts have been set forth and his jurisdiction invoked, a chancellor may go upon the bench and on his own motion enter such an order as was made in this case. When jurisdiction of the person and the subject matter has attached, presumptions are indulged that facts justifying the judgment were proven or found; but presumptions cannot supply jurisdictional facts. These principles have long been recognized and frequently applied by this court.

Thatcher vs. Powell, 6 Wheat. 116, 125.
Comstock vs. Crawford, 3 Wall. 396, 404, 405.

Galpin vs. Page, 18 Ib. 317, 364, 366.
United States vs. Ross, 92 U. S. 281, 284.
Rich vs. Town of Mentz, 134 U. S. 632, 641.

The fact that in some of these cases the jurisdiction of the court was statutory does not detract from their force as authority; for if a court of general jurisdiction may only act upon a particular state of facts, those facts must be brought into the record by pleading or averment. They cannot be supplied by presumption. Especially is this true where the judgment or record states a particular ground of jurisdiction and that ground is not sufficient. The opinion of the learned justice of the territorial Supreme court, however, declares that the recital in the order under consideration that it was based upon the consent of the infants does not preclude the presumption that there were other and sufficient grounds for the exercise of jurisdiction, and that such presumption will be indulged. This, we respectfully submit, is not the law. When it is recited that such an order was entered on the consent of the infants, there is no room left for presumption that it was made on petition setting forth the requisite facts, and that such facts were found on the hearing. This is expressly ruled by this court in Galpin vs. Page, *supra*. It is there said: "Presumptions are only indulged to supply the absence of evidence or averment respecting the facts presumed. They have no place for

consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence, or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred."

The jurisdiction to make the order is contested, and the court finds that the record discloses no petition or motion, no reference to a master and nothing else than the recital of consent in the order as a basis for making it. This being a bill asking, we must assume, relief based on this order, it is not only incumbent upon the complainants to sustain its validity, but it is the privilege of defendants to assail it, and they have successfully done so upon every ground relied upon in their answers, including that of fraud and imposition, as we shall hereafter attempt to show.

We do not understand the learned justice who prepared the opinion of the territorial court to contend that the consent of infants can bind them by contract or form the basis for a valid decree affecting their interests. Nor do we apprehend that counsel for appellees will make such contention. If these infants could not consent to a decree against themselves, or make a binding contract, they could not authorize an attorney or any other person to consent or contract for them; nor could their guardian

ad litem, or general guardian, if they had had one, bind them by waiving any of their rights. Consent cannot be the basis for a judgment affecting the rights of infants, no matter by whom or how solemnly given; nor can a judgment which affects them be taken by default, or except where they are represented by guardian *ad litem* and upon proofs taken.

Tyler on Inf. and Cov. p. 173.
Tuttle vs. Garrett, 16 Ills. 354.
White vs. Miller, 158 U. S. 128.

But, as we have already had occasion to say, the court finds as facts that the order in question was entered without the personal procurement, knowledge or consent of any of the complainants in that suit, and about four months after the relation of attorney and client between them and the counsel acting in the suit prior to May 3, 1866, had ceased, and when no other counsel had been retained. The inevitable conclusion must be that the consent recited, if given at all, was by counsel unauthorized to act for these infants, and was procured to be made and entered by Maxwell, and the court to that extent imposed upon.

In *Ex parte Jewell*, 16 Ala. 439, a trustee of real estate held for the use of the wife of the grantor and her minor children, applied to a chancellor with the wife's concurrence, for authority to sell the estate, on the ground that he and the *cestui que*

trust had removed from the state, and that it was inconvenient to administer the trust, and in general terms alleging that it would be to the advantage of all concerned to sell and reinvest the proceeds. While admitting the jurisdiction of a court of equity in that state, without statutory authority, to order a sale of the real estate of infants in a proper case, the Supreme court says: "Yet I confess I have not been able to find a case in any of the English books where a sale of real estate of infants has been ordered on the ground alone that it would be for the interest of the infants, unless connected with the further reason of paying the debts or providing maintenance for the infants." It is further declared: "But then the facts which render the sale necessary should be alleged as well as proved, that the chancellor may clearly see that the interest of the infant would not be prejudiced, but, on the contary, promoted by the sale * * * It is true the petition alleges it would be greatly to the interest of the beneficiaries to sell the land, but the proof shows no necessity for the sale. The proof should go further and show the condition of the property, what it now yields, the expense incident to the management and keeping of it in repair, and also show that the value of it could be invested more profitably for the benefit of the minors." The bill was ordered dismissed. In the later case of *Crawford vs. Cresswell*, 55 Ala. 497, a devisee of an estate held for his and his minor children's use, filed

a bill asking authority to invest a part of it in a home, on the ground that it would be for the interest of the family in their necessitous condition. All parties consented by counsel, and the infants, by their guardian *ad litem*, filed a written consent as well; and upon this consent, without order of referance or proof, the chancellor ordered the investment. On appeal, the Supreme court reversed this judgment, dismised the bill, and say: "The averments should show facts, not merely conclusions, why the interest in remainder will not be prejudiced, if they should not go further and show that they will be promoted by the change; these averments must be proved by testimony that is at once intelligent and reliable and free from all imputation of bias." Surely a no less, but more rigid, rule as to allegations and proofs as a ground for such an order should be required when authority for the conversion of real estate into personlty is sought.

But the court had no power to make the order in question without legislative authority on the subject, and at that time there was no such legislation in New Mexico. The power to sell the real estate of infants, even upon petition for that purpose by a general guardian, averring the necessities of the infants, is not inherent in courts of equity. The Supreme court of the territory in May, 1884, so held with reference to the very order in question. (*Bent vs. M. L. G. & Ry. Co.* 3 N. M. 158, 170-2). This ruling was made on appeal from the judgment

of the District court sustaining a demurrer to the bill filed by these appellants against these appellees in which the same questions are presented as are raised by the answers to this bill. It is there expressly held that independently of particular grounds of irregularity in the proceeding, the order in question was void for want of jurisdiction by the court of the subject matter.

This decision was based partly on the judgment of this court in *Williamson vs. Berry*, 8 How, 498, 581, in which it appears that the legislature of New York had by a private act authorized one Clark who, with his minor children, was the devisee of certain real estate, to sell a part of it to maintain them and himself under conditions to be named or approved by a court of Chancery. A chancellor ordered a sale under this act, and after the minors attained their majority it seems an action was brought to recover their interest in the property. The report of the case is quite voluminous, but this court held the sale void as against the infants, because not made in pursuance of the directions of the act, the chancellor having no authority in the premises except that given by the act. Mr. Justice NELSON dissented on grounds not affecting this question; but he distinctly recognized, with the majority of the court, the necessity for legislative authority in such cases. He says: "The management and disposition of the estates of infants * * * are among the mass of powers

upon this subject which belong to the original and inherent jurisdiction of the court of Chancery. They relate to their personalty and the income of their real estate, the court having no inherent power to direct a sale of the latter for their maintenance or education; that power rests with the legislature." * P. 556.

In 1872 an act was passed by the legislature of New Mexico conferring such jurisdiction upon the courts of the territory as was attempted to be exercised in this case in 1866 (Prince's Stats. p. 485). The territorial Supreme court in the case cited well say that the act was a clear recognition of the necessity for legislative authority in such cases. It is believed now that there is no state in the Union in which the jurisdiction to sell real estate of infants is not given, and its exercise regulated, by statute, and in nearly all it is limited to their necessities or the preservation of the property. In the earlier history of adjudications on this subject in those states, in which it was held that legislation was not essential to the jurisdiction, the question generally arose in cases where persons *sui juris* were jointly interested with infants in the property, and had a right to demand a sale, as in the administration of estates, partition, assignment of dower, etc.; and in many cases the jurisdiction will be found to be based on authority implied from legislation on other subjects. But even in such states, as we have seen, the rule is that sales should not be ordered unless

the jurisdictional facts that a necessity exists for the sale be shown by clear, precise averment, and supported by convincing proofs.

Elsewhere, in connection with the consideration of another question passed upon in the decision cited from the territorial Supreme court of New Mexico, we contend, as we did in the lower court, that whether a correct declaration of the law or not, that decision became the law of this case, which neither the District court nor the Supreme court could review, ignore or reverse. In answer to this contention counsel for appellees argued, as will probably be done here, that the law of the case is to be found in

The Previous Decision of this Court.

Though this view is not in terms adopted in the opinion by Justice Collier, such reference to and reliance upon that decision—*Thompson vs. Maxwell*, 95 U. S. 391—is made as to call for an examination of what is said in the opinion, and the grounds of the decision. The original suit, it may be fairly stated, was based upon the allegations of fact that the alleged contract of sale was made by Alfred Bent in his lifetime and not by his infant heirs after his death, and that the contract had been fully caried out by Maxwell paying the purchase price. There was a further declaration as to matters of law, that by reason of the recitals in the orders of April and September, and other irreg-

ularities, such orders were void. The allegations of fact were denied by the answers, and the declarations as to matters of law were of course concurred in. When this court found that the allegation as to the making of the contract was not sustained by the proofs, the bill and the decree entered under it were left without support. No further finding or decision by this court was necessary to the judgment of reversal; but, inasmuch as it appeared to the court by the bill and the recitals of the order itself that the decree of September, 1866, was entered by the consent of complainants, this court held, as a further ground for reversal, that they could not maintain a bill to review, or vacate it. But the learned Justice (BRADLEY) who wrote the opinion indulged in reflections and suggestions which were not called for in the case, and which we submit were *obiter*. It is there said: "A decree for carrying out a settlement and compromise of a suit is certainly not of itself erroneous;" and this further suggestion is made: "And if instead of seeking to reverse the decree of September, 1866, (which for like reasons of public policy as applicable to the security of judgments that have passed into *rem adjudicatum* is not allowed) the decree had sought to carry that decree more effectually into execution, it would have been free from legal objection, and equally conducive to the object in view." The question before the court was, what had been done, and not what might be done; and after quoting

Redsdale's Treatise to the effect that where it "becomes impossible to carry a decree into execution without further decree of the court, a bill may be maintained to carry it into execution;" the opinion further says: "Now in order to execute this decree, or determine whether it has or has not been substantially executed, and to determine and declare the effect of such execution upon the rights of all concerned, and thus remove any cloud from the title arising from the imperfection of the proceedings, it is competent for the parties to file a bill conceived and constructed to that end." The expressions quoted were not applicable to the case then before the court, but were outside of and beyond it.

Chief Justice MARSHALL, in *Cohens vs. Virginia*, 6 Wheat. 399, 401, referring to expressions of similar character in the opinion in another case, stated the accepted rule on this subject, and the reason for it in concise terms: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but should not control the judgment in a subsequent suit where a different point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. The principles which may serve to illustrate it are considered in their re-

lation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

The amended bill and answers in the case at bar present a wholly different case from that heretofore before this court, and raise numerous issues which were not presented, or even suggested, under the original pleadings. Certainly the expressions we have quoted cannot be accepted as a decision of this court that under the amended pleading, and issues presented, and facts found, and questions of law raised, a decree should be entered declaring that the territorial court had jurisdiction without legislation to order a sale of the interest of these infants; or that the infants or their guardian *ad litem* had capacity or authority to consent to such decree; or that they did in fact consent or attempt to do so; or that such consent was fairly and legally obtained, or made to appear to the court; or that counsel assuming to appear for them had authority so to appear and consent; or that there is a conclusive presumption, which cannot be overcome by proof, that a petition was filed representing that it was necessary or to the advantage of the infants that their interests should be sold; or that these essential facts were shown by proofs.

The inapplicability and inconclusiveness of a prior judgment as an estoppel, or otherwise, in such cases as this are illustrated in *Nesbitt v. Independent District of Riverside*, 144 U. S. 610, 619-21, and *W. & W. R. Co. vs. Allsbrook*, 146 U. S. 279. In the

first case was involved the question of the liability of the defendant on bonds on some of the same series of which a suit had been maintained. The bonds recited that they were regularly and duly issued according to law. In a subsequent suit the new element of notice of the facts rendering them invalid was brought home to the holder. It was claimed that the judgment in the first suit was conclusive in the second. But this court held otherwise. Mr. Justice BREWER delivering the opinion of the court says: "In this action notice is proved and an additional fact put into the case which makes a new question. The effect of recital is one thing; that of recitals coupled with notice is another. The one question was litigated and determined in the Des Moines suit; the other is presented here. Surely an action as to the effect of one fact does not preclude in a second suit an inquiry and determination of that fact in connection with others. Infancy is pleaded in an action on a contract, and an allegation is made establishing it as a defense. In a second suit between the same parties on a different cause of action, though created at the same time, may not the plaintiff prove a ratification after majority?" In the second case referred to, a suit had been brought in North Carolina involving the exemption from taxation of the property and franchises of the defendant company, the particular property involved being partly what had been acquired from another railroad company whose prop-

erty was not embraced in the exemption. This fact either did not appear or the distinction between the main line of road and its branch was not taken account of or considered in the first decision. It was held in the first suit that the property was exempt. In the second suit, in which it was claimed that the property of the branch road was not included in the exemption, it was argued that the prior decision of this court was conclusive upon the question. The contention was not allowed. It is said on this point in the opinion by Mr. Justice FULLER: "These proceedings are relied upon as an estoppel so far as the road from Halifax to Weldon is concerned, or as controlling authority in the premises. We think they cannot be so regarded. The causes of action are not identical, and the points or questions litigated are not the same. The distinction between the road from Halifax to Weldon and the main road from Wilmington to Halifax, was not adverted to, and if that question might have been raised, this suit being upon a different cause of action, the judgment in the former case cannot operate as determining what might have been, but was not, brought in issue and passed upon." In the case at bar there was no occasion in the suit as originally brought for defendants to assail the validity of the orders or decrees of April and September, 1866; for complainants themselves declared them invalid, and in effect renounced any rights under them. By the amended bill they in effect declare upon them as

grounds for the relief prayed for; and thereupon they are assailed by defendants on many grounds both of fact and of law. We therefore submit that the decision of this court in *Thompson vs. Maxwell* cannot be invoked as an estoppel or an adjudication on this appeal of any question presented by this record.

The Character and Effect of the Decree of June, 1865.

The learned counsel for complainants, doubtful (if not conceeding the lack) of power in the District court to order a sale of the interest of minors in lands, contend very earnestly and elaborately in the court below that the defendants in April and September, 1866, had no vested estate in the grant, but only an interest in a pending lawsuit in which an interest was involved. The basis of this contention was that the decree of June, 1865, was merely interlocutory. This view the learned justice of the territorial Supreme court seems to adopt in the opinion filed. For it is there stated that at the time the decree of September, 1866, was entered, appellants "had nothing more (if anything) than an equitable estate;" that the decree establishing their interest in the grant was merely an interlocutory order in a pending suit "with nothing in it that was *res adjudicata*." The basis for these contentions, or the test of their soundness, it would seem is found in the claim that the decree of June, 1865,

was not appealable, and was therefore subject to be vacated at the pleasure of the court at any time before the case was finally disposed of. It is assumed, apparently, that if the last proposition be maintainable the others follow as necessary conclusions. We challenge both the premise and the conclusions.

What is and what is not an appealable order or judgment is a vexed question in this and other courts. While not conceding that the decision of the question is at all necessary to the determination of this appeal, the insistence upon it by counsel for appellees and by Justice Collier justify us in giving it more attention than we think it is entitled to. It is submitted that decisions in strictly partition suits are not pertinent to the question whether the decree of June, 1865, was an appealable judgment or not. The chief object of the suit in which that decree was rendered was to have adjudged to the heirs of Charles Bent an interest in the grant, which was denied and refused them by Beaubien, Miranda and Maxwell. It cannot be said their right to partition was put in issue if it should be determined they had an interest in the grant. That followed as a matter of course, as incident to the judgment establishing the controverted right of ownership. The principal object of the bill could have been achieved without partition. Had the bill prayed that a conveyance be made of the interest decreed, instead of partition, the effect of the decree of June, 1865, as an appealable judg-

ment, would not have been essentially different from what it was. In strictly partition suits, whether actual partition may be made or a sale be necessary, may sometimes furnish occasion for controversy. But in this case there was and could be no question from the vast extent in acreage of the land that an actual partition was practicable. Hence everything remaining to be done under the degree establishing the interest, was in the nature of executing that degree. Such specific directions as to the legal rights of the parties in the partition, and how the partition should be made, or the decree executed, are given as to leave nothing but ministerial acts to be done. (Rec. p. 115, fol. 117). It is hardly to be contemplated, therefore, that an appeal would not have been entertained by reason of the exceptional character of the case had one been taken from the decree in question. The actual partition and report by the commissioners could only have presented ministerial acts or matters of fact in compliance with the directions of the decree fully settling the legal rights of the parties, and a judgment confirming their report, would not have been reviewed and reversed on appeal to the Supreme court of the territory or to this court on questions of fact alone. To execute the decree would have involved not only months of labor by the commissioners and engineers, but thousands of dollars of expense. And this should surely not be required as a condition precedent to the right of

appeal, in which might be determined that no right of partition existed. The propriety of entertaining an appeal under conditions infinitely less onerous is recognized by this court in the leading case of *Forgay vs. Conrad*, 6 How. 202. That was a bill to set aside certain conveyances alleged to be fraudulent, and for an accounting of the rents and profits. On hearing, the conveyances were held to be fraudulent and an account ordered. One of the conveyances held to be void was made to Forgay, who appealed from the judgment against him, before the account was taken. It was objected in this court that the appeal was premature, and a motion made to dismiss it. Chief Justice TANEY, delivering the opinion of the court, said: "The question upon the motion to dismiss is whether there is a final decree within the meaning of the acts of congress. Undoubtedly it is not final in the strict sense of that word; but this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature." After citing previous decisions of the court, the learned chief justice proceeds: "The case before us is a stronger one for an appeal than the last mentioned [*Michaud vs. Girod*, 4 How. 503], for here the decree not only decides the title to the property in dispute, and annuls the deed under which defendants claim, but also directs the

property in dispute to be delivered to the complainant, and commands execution, and according to the last paragraph of the decree, the bill is retained merely for the purpose of adjusting the accounts referred to the Master." The case at bar is a still stronger one for an appeal than either of the foregoing. Justice Collier cites *Perkins vs. Fourniquet*, 6 How. 206, which immediately follows *Forgay vs. Conrad*, in the report, referring to it as in strange contrast with the latter, assuming that different rules are announced in the two cases. But an examination of the cases leaves no ground for such an implied criticism. In *Forgay vs. Conrad* the accounting order was incidental to, and followed as a matter of course, the judgment declaring the conveyances void; whereas in the other case the object of the suit was an accounting. The suit was based upon the undisputed facts that the defendant had administered the estate of the mother of complainants, who were her heirs and entitled to an accounting. It was denied, it is true, that he had wasted or appropriated to his own use the estate, but whether he did or did not could only be made to appear on an accounting. The two cases were not at all analagous. It would be a reflection upon the court and upon the intelligence of the learned chief justice who wrote the opinion in both cases, in the latter of which he refers to the other, to say that the appeal was dismissed in one and retained in the other, when there was no essen-

tial difference in this respect between the two cases. Justice Collier refers to a later case by the same title (*Perkins vs. Fouruiquet*, 16 How. 82) as the same case reported in 6th Howard on a second appeal, and as illustrating the trial court's repentance between the entry of an interlocutory order and final judgment. An examination of the cases by this title reported in 6th, 7th, 14th and 16th Howard will disclose the fact that the learned Justice is mistaken. Mrs. Bynum married Perkins and died intestate. Her children instituted several different suits in Louisiana and Mississippi for an accounting as to their mother's estate. The case decided in 6th Howard, 206, went up from the Circuit court for the eastern district of Louisiana, and that reported in 16th Howard, 82, from the southern district of Mississippi. In one of the cases which came to this court from Louisiana (7 How. 160) it was held, reversing the judgment of the Circuit court, that an instrument offered in evidence was a release by the heirs of Mrs. Bynum, and in another case a plea of former adjudication is sustained. It is probable that one of these decisions was brought to the attention of the Circuit court for the district of Mississippi between the time of making the order for an account and the coming in of the master's report, or at that time. The very meagre report of the case in 16th Howard, we submit, does not justify the inference drawn by Justice Collier that the trial court on its own motion, and because of his

conscious error in making an order for the accounting, set aside such order and dismissed the bill without motion or suggestion or facts found later in the hearing. There is no disposition to controvert the proposition that an order for an accounting is an interlocutory order, and that if it shall be made to appear to the court by motion, petition, or otherwise before final judgment that the party asking it is not entitled to such an account, the court may vacate its order and dismiss the bill. That, however, is in no sense the case at bar.

This question seems to have been an especially prolific source of contention in this court since the decision of the two cases to which we have referred. If it were as important in the case at bar as counsel for appellees contend, and the Supreme court of New Mexico indicate, it would be a profitless task for us to review and attempt to harmonize the numerous cases in which this question has been presented. This is measurably done by Justice BLATCHFORD in *Keystone M & I. Co. vs. Martin*, 132 U. S. 91, in which all the cases are classified and a few are examined. No rule of uniform application can be deduced from this review. As to the case before the court for decision it is said "The bill prays only for an injunction and account of the quantity and value of the ore taken from the land by the defendant. This injunction is granted but the account remains to be taken." It is held the appeal was premature. *Forgay vs. Conrad is* re-

ferred to in this case and in *Winthrop Co. vs. Meeker, 109 U. S. 180*, with approval, and especially in the latter case where Chief Justice TANEY's opinion is quoted at some length by Chief Justice WAITE. In the latter case a corporation had made a lease of mining property, and a minority of the stockholders brought suit "the object and purpose of which was to set aside as fraudulent and void the proceedings of the stockholders," authorizing the lease. On hearing a decree was entered declaring the lease void, appointing a receiver and ordering the lessees to account. Before such an accounting was had, an appeal was taken. A motion to dismiss the appeal because premature was denied by this court.

The features which distinguish *Forgay vs. Conrad* from *Perkins vs. Fourniquet* are clearly recognized and emphasized by several state courts of high character.

Jones vs. Wilson, 55 Ala. 50;

Graham vs. Harding's Exrs. 4 Dana. 559.

Arnold vs. Sinclair, 11 Mon. 556.

Sharon vs. Sharon, 79 Calif. 633.

B. & O. R. Co. vs. P. W. & Ky. Co. 17 W. Va. 812.

Kreitline vs. Franz, 106 Ind. 359;

Jackson vs. Meyer 120 Ib. 504;

Williams vs. Wills, 62 Iowa, 747.

Sharon vs. Sharon, *supra*, was a divorce suit in which the marriage was denied. A divorce was de-

creed and as ancilliary to that decree, the court ordered a division of the community property and appointed a referee to ascertain and report to the court its character and amount. An appeal was taken at this point, and in the Supreme court of California, a motion to dismiss the appeal because the judgment was not final, was denied. The court say at page 703: "Here all the issues necessary to determine whether or not plaintiff was entitled to a share in the community property, had been tried and determined by the court, and the court had determined the same and filed its findings thereon and judgment could be, and thereafter in due course of time was, entered thereon. All that remained was to carry that judgment into effect by making division of the community property as provided in the decision and the judgment which followed it. The judgment of the court on the issue involved was a final judgment."

B. & O. R. Co. vs. P. W. & Ky. R. Co. *supra*, was a condemnation suit where the defendant denied the right of petitioner to condemn the property in question because it was not subject to condemnation. The trial court sustained petitioner's right and an appeal was taken before the appointment of commissioners or the assessment of damages. The Supreme court of West Virginia held the judgment was appealable, notwithstanding the damages had not been assessed. While admitting the right of defendants to raise the question that the property was

not subject to condemnation on exceptions to the commissioners' report, the court say: "It is a practice which should be discouraged. In a condemnation proceeding the first question to be decided is, shall the land be condemned for the use of petitioner? And it is a better practice to determine this question before the commissioners to assess the value are appointed."

On error to the Supreme court of the same state, this court, in *W. & B.Co. vs. W.B.Co.* 138 U.S. 289, denied a motion to dismiss the appeal taken under like conditions, citing and approving the foregoing decision of the Supreme court of West Virginia. As to the propriety of such practice, Mr. Justice FIELD, who delivered the opinion of this court, says: "If the judgment had been different, all further proceedings would have ended. Being for the condemnation, the estimate of the compensation which was to follow was to be made by commissioners to be appointed, and might therefore be treated as being a different proceeding."

In *Dow vs. Blake*, 148 Ills. 76, it was urged in a suit upon a foreign judgment that it was not final, because it gave leave to the defendant to apply to the court for its modification as to the time of payment. But it was held that this applied only to the execution and not to the merits of the judgment, and that it was final.

In nearly all the cases in which this question has been presented in this or in state courts, it has

arisen on motions to dismiss appeals prematurely taken. In such cases courts may safely give the benefit of any doubt of the appealable charactor of judgment to the moving party, for a dismissal does not deprive the other party of his appeal at the conclusion of the case. But in some instances courts have taken the responsibility of holding appeals lost because not taken from judgments claimed to be interlocutory. In the two cases cited, *supra*, from Indiana, where title was denied in partition suits, it was held that an appeal from the judgment establishing the title, not taken within the statutory limit of one year, though in less than a year from the confirmation of the report of commissioners, was too late. To the same effect is *Lewisburg Bank vs. Sheffey*, 140 U. S. 445. It that case it appears that one Glendy executed to Mathews a trust deed to secure a debt to the bank, and afterwards a second deed to Sheffey and Bungardner upon the same and other property in favor of his creditors generally. The last instrument was first recorded. The bank advertised the property covered by its deed of trust for sale, and the trustees in the other deed applied for an injunction, on the ground that their deed gave them the prior right. This was contested by the answer, and at the hearing in May, 1878, the bank tendered an amended and supplemental answer setting up further defenses. The answer was refused and the injunction made perpetual, and commissioners, previously appointed, were ordered to dis-

pose of the property in accordance with a previous stipulation, and report to the court. In August, and after the adjournment of the May term of the court, the bank tendered its petition for a rehearing, on the ground that the court had erred in rejecting its supplemental answer. The hearing on this petition was continued from time to time, and at last granted, the decree of May, 1878, vacated, and the answer, at that time rejected, was allowed to be filed. Under it additional testimony was taken. Various reports seem to have been made by the master afterwards, to which exceptions were taken by the bank, the chief of which was the rejection of its claim as a preferred debt. The case was pending in the Circuit court for the district of West Virginia for nearly ten years after the judgment in May, 1878, when a final decree in the strict and technical sense of the word was entered in accordance with the terms of the decree of May, 1878. On appeal, a review was sought of the judgment of the Circuit court as to matters passed upon at the hearing in May, 1878. This court holds that the granting of the rehearing after the term expired, was without jurisdiction, the only remedy of the bank being an appeal from that judgment. The second, or general trust deed, provided that after paying the amounts due on judgment and vendors liens, the balance should be paid to other creditors ratably, their debts proven before a master, which was done after the decree of May, 1878, and held to be in ex-

ecution of the decree settling the controverted question as to which of the deeds had priority. The opinion of this court is by Mr. Chief Justice FULLER, and on this point he says: "The controversy raised by the pleadings, and to be determined by the court, was whether the property passed under the deed to the plaintiffs or under that to Mathews, and whether the bank was entitled to the property. * * * * * * * So that all those matters [set up in the supplemental answer] were necessarily passed upon by the court, and the decree in terms declared that the facts stated in the amended and supplemental answer did not change the rights of the parties, made the injunction perpetual, and directed the fund to be brought into court for distribution in accordance with the provisions of the deed. * * * This finally determined the entire controversy litigated between the parties, and nothing remained but to carry the decree into execution." Surely we may confidently invoke this decision as an authority clearly in point in the case at bar on two questions: (1) That the decree of June, 1865, was, in the sense in which we deal with it, a final or appealable decree, settling the controverted matter of title. (2) That any attempt to vacate that decree, whether on petition for rehearing or otherwise, after the term at which it was entered, was ineffectual for want of jurisdiction, the only remedy being by appeal. A similar ruling is made by this court in a criminal case (*U. S. vs.*

Pile, 130 U. S. 280.) The defendant was convicted, motion in arrest and for a new trial made and denied, and sentence passed, but its execution was suspended for three months. It was held that suspension of the execution of the judgment without any motion pending for a rehearing did not give the court jurisdiction at a subsequent term of the court to set aside the judgment overruling the motion in arrest. After finally granting the motion in arrest, the judgment was vacated, but it was held that such judgment was without jurisdiction, and void.

Conceding, for the sake of argument, that the June decree was not final in the sense we are considering it, was it less binding upon the parties and the court until properly vacated? Because it was subject to be revoked, was it to be ignored and entitled to no respect as an adjudication until after the conclusion of the whole case, or until the confirmation of the report of the commissioners appointed to execute it? Justice COLLIER does not claim that the September decree vacated that of June, 1865, as an adjudication of appellant's rights, for he says: "It was a mere modification of the prior decree *pro tanto*—that is to say, so far as the adult complainants were interested, it was entirely abrogated, and so far as the infants were affected it dismissed only the partition part of the former decree, even if it did that." (Rec. in No. 91, p. 83.) Whether the learned justice is here treating of what the September decree purported to do, or of its

legal effect by reason of the infancy of these appellants, we know not. If the latter, then he concedes away the entire case of the appellees, and if the former we most respectfully submit that there is nothing in the terms of the extraordinary and sweeping order to justify such a distinction or qualification. If, as we must suppose, the distinction is based upon the fact, that some of the parties affected by the order were *sui juris*, and others were without legal capacity to consent, then confessedly nothing was done by the District court to affect a divestiture of the title of these appellants. We need not argue nor cite authority to this court for the proposition that every judgment by a court of competent jurisdiction, whether interlocutory or final, is binding until annulled or reversed. We do not understand that it is contended in this case that the District court took any action nullifying the decree of June, 1865, unless that of September, 1866 had such effect. While conceding that that decree had no other effect than to dispense with the partition, Justice COLLIER seems, nevertheless, to contend that the decree of June, 1865, established nothing. To use his own language, the only right appellants had under that decree was an interest in "a suit pending, with nothing in it that was *res adjudicata;*" that after, as well as before, their interest in the grant was a mere equity, and in no sense a legal or vested interest. For this reason, it is said, the court had inherent jurisdiction to dispose of the

interest. The character of the estate with which this decree invested the Bent heirs was before the Supreme court of New Mexico in *Bent vs. M. L. G. and Ry. Co.* 3 N. M. 158, before cited in another connection. It is there said: "It has been suggested by counsel for defendants in error in their argument, that the estate vested in these infants was only equitable." After stating the argument in support of this suggestion, the opinion proceeds: "We hardly think this suggestion or argument is worthy of consideration. It is enough to say that the decree of the court in that suit in equity changed what had theretofore been an equitable interest into a substantial and well defined legal interest. It was for that purpose the suit was brought, and its purpose was accomplished and declared by the decree in question. It being a legal estate with which these infants were vested, it was error for the District court of Taos county at that time to make a decree authorizing any person to divest them of that estate." The decree itself was before the court, and that part of it adjudicating and defining the interest to which the Bent heirs were entitled, is copied into the opinion. In immediate connection with what we have quoted from the opinion, the court discuss the question of jurisdiction, and holds, for the reason stated, the court was without jurisdiction to order the sale. We submit that this decision, on both these propositions, became the law of the case both in the District court, which after

wards ignored it, and in the Supreme court itself.

Elliott's App. Pro. sec. 578.

Skillens' Exr. vs. May's Exrs., 6 Cranch 267.

Washington B. Co. vs. Stewart, 3 How. 413.

Sibbold vs. U. S. 12 Pet. 488.

Moore vs. Calkins, 95 Cal. 435.

Heffner vs. Brownell, 75 Ia. 341.

Alexander Sav. Inst. vs. McVey, 84 Va. 47-8.

Thatcher vs. Gottlieb, 59 Fed. Reb. 872.

Gould vs. Sternberg, 128 Ills. 510.

Plymouth Co. Bank vs. Gilman, 3 S. D. 170.

The last case cited holds that the state Supreme court is bound by this rule when the previous decision was made by the territorial Supreme court. The fact that the personnel of the courts of New Mexico was changed between 1884 and 1893 does not, we apprehend, make this rule less binding. The legal effect of this decision, however, is sought to be avoided on the ground that the two questions need not have been decided by the court; in other words, that those portions of the opinion which pass upon these questions were *dicta*. The bill of appellants in that case seeks to enforce the decree of June, 1865, and to vacate the alleged decree of September 1866, because the latter was for several reasons invalid, and given without jurisdiction. The validity of the latter decree was therefore directly

in issue, and the court holds it void for want of jurisdiction of the subject matter. As shown by the quotation from the opinion, counsel for appellees contended that the decree was authorized, because appellants' interest under the June decree was only an equitable claim, and not a legal or vested estate. The ruling made is in direct response to this contention. If these two questions were not before the court on that appeal we do not understand how they were properly subjects for decision on the last appeal. Yet so far as the opinion may be taken as a basis for its judgment, that tribunal did not hesitate, not only to decide both questions, but to decide them differently, from the judgment already given by the same tribunal on the previous appeal. As indicated by this record, L. B. Maxwell, in his lifetime, brought many remarkable things to pass, and the corporation bearing his name may be equally potential; but the principles of law surely do not change at its behest.

But giving the decision referred to no more weight than its reasoning entitles it to, and treating the question as an open one, we submit that the judgment appealed from cannot be sustained on the ground upon which it is thus placed by Justice Collier. Under allegations of the bill filed by Charles Bent's heirs the defendants in the suit held the legal title to the interest claimed as trustees. The prayer of the bill is: "And that this Honorable Court may decree to your petitioners according, to

their respective rights, their said portion or interest in and to the said grant or merced and to their heirs in fee simple." (Rec. p. 107, fol. 193). The decree entered under this bill, upon demurrer and answer denying the trust, proofs and hearing, found that Charles Bent at the time of his death was entitled to a one-fourth interest in the grant, and "that the said undivided one-fourth part in and to said grant of land or real estate be and hereby is declared and established in them, the said Alfred, Estefana and Teresina, and to their heirs and assigns forever, with full and perfect right, power and authority to possess and enjoy the same." (Rec. p. 115, fol. 207). The previous equity was thus transformed into a present legal estate, with the right to enter into possession of it; and it was beyond the power of the court to affect the title by subsequent decree. That the decree accomplished what it purported to do the defendants in that suit, appellees here, ought to be estopped to deny. They secured to be entered in that case in April, 1866, two orders, one substituting these appellants as the heirs-at-law of Alfred Bent and the other appointing their mother their guardian *ad litem*, with power to "carry into execution all sales or transfers made of their interest in the real estate therein described." (Rec. p. 125). The deed, contemplated by the order was prepared by counsel for Maxwell. (Rec. p. 158, fol. 232). The granting words of that deed are: "I do grant, bargain, sell, convey, confirm and transfer unto the said Lucien

B. Maxwell, his heirs and assigns." Following these words is a description of the entire grant, and following that is this *habendum* clause: "To have and to hold one undivided one-twelfth interest of, in and to the above described real estate," with this covenant: "I Guadalupe Bent, guardian *ad litem*, hereby covenant to and with the said Lucien B. Maxwell, his heirs and assigns, that the above described interest hereby conveyed of, in and to the said real estate is free and clear of all encumbrances, and that I, my heirs, executors and administrators, shall and will warrant the title to the same unto the said Lucien B. Maxwell, his heirs and assigns forever, against the lawful claims or demands of all persons whomsoever." In the court below counsel for the Maxwell company had much to say as to the effect of this covenant on the title, both as to Mrs. Bent and her children. Certainly a direction to a guardian or commissioner to convey the interest of minors in real estate does not authorize such person to make covenants for them. If it be her personal covenant it can add nothing to the effect of the deed as a conveyance of the title of the infants. The learned counsel, as well as the court, seem to forget that the grantee under this deed had held the interest described in trust for the grantors; and it illpstrates the extent of Maxwell's imposition upon these infants and their mother that he should have exacted of her a conveyance of the interest of his own *cestui que trusts* to himself, with full cove-

nants of warranty. If Maxwell held the title as trustee and denied the trust, surely a decree against him should operate to establish an estate in his *cestui que trusts*. (1 Pom. Eq. secs. 430-1). But whatever be the effect of the covenants in the deed in other respects, we submit that the insistence upon them by Maxwell should estop him to say that the heirs of Bent had no interest or title in the land which was the subject of a conveyance.

It is impliedly admitted by Justice Collier that if the interest of these infants had been a legal estate at the time of the transaction in question, the District court would have been without jurisdiction to dispose of it. And it is therefore held, as contended by counsel, that courts of equity have inherent jurisdiction to direct a sale of equitable interests of infants. To support this contention two adjudications are cited, one by the old Court of Errors of New York and the other by the Commissioner of Appeals of that state. The first (*Cochran vs. Van Surley*, 20 Wend. 365,) was a sale made under authority of a private act of the legislature of New York for the relief of one Clark. This court considered a sale under this act in *Williamson vs. Berry*, 8 How. 591. Referring to *Cochran vs. Van Surley*, and particularly to the opinions of the Chancellor Walworth and Senator Verplank in that case, this court then said: "Our conclusion, however, contrary to theirs, will be put upon grounds not suggested when they acted in those cases. In-

deed our point of difference is not concerning a principle or rule in chancery, but as to the application of the rule in *Cochran vs. Van Surley*. It was said in that case, and it was the foundation of the judgment in it, that the decree in chancery could not be inquired into in a collateral way for the purpose of setting aside rights growing out of it. We concur that neither orders nor decrees in chancery can be reviewed as a whole in a collateral way, but it is an equally well settled rule in jurisprudence that the jurisdiction of any court exercising authority over the subject may be inquired into in every other court when the proceedings of the former are relied upon and brought before the latter by the party claiming the benefit of such proceedings," citing previous decisions of this court. Then the court states the question thus: "The question in *Cochran vs. Van Surley*, and in this case, is whether the chancellor did or did not, in a case in which he had jurisdiction for certain purposes, exceed the jurisdiction given to him for the special purposes of the case. Jurisdiction may be in the court over the cause, but there may be an excess of jurisdiction asserted in its judgment." It is then said that if the decision is to be taken as deciding that the chancellor had authority under the act to order the sale objected to by the infant heirs of Clark (of which some doubt is expressed), it would not be binding upon this court because based upon a private and not upon a general statute. Hence,

Cochran vs. Van Surley is overruled and its authority for the proposition to which Justice Collier cites it is denied. Justice Collier seems not to have observed that the decision cited was rendered under a special statute, conferring upon the father of the minors in that case, the right to apply to the court of chancery for authority to sell his children's interest in the property in question. In that case the father held the legal title in trust for himself and his children. The sale of that interest was held by this court to have been without authority, for the reason that the directions of the legislature were departed from, and the chancellor had no authority in the premises outside of that given by the legislature.

The second authority relied upon for the proposition that a court of chancery has inherent authority to dispose of equitable estates of infants, is *Anderson vs. Mathew*, 44 N. Y. 249 (Com. of Appeals). In that case the land in question had been granted to a trustee to pay the income to the grantor's daughter for life, and then to convey it to her children. After the death of the trustee the daughter and one of her children, of full age, applied to the court of chancery for authority to sell the property and reinvest the proceeds, on the ground that the property was falling into decay and the income was insufficient to do more than to keep the property in repair, leaving nothing for the mother. Two of the children were minors. A sale, after

reference to and report by the master, was ordered and the moneys reinvested in part in other real estate under the directions of the court; and later the property so acquired was partitioned by sale, and the heirs received the proceeds. This was a suit in ejectment by one of the minor heirs to recover her interest in the property originally granted, and it was held that she could not recover, principally because she had ratified the sale by receiving, after her majority, the proceeds of the partition sale. It is also said in the opinion that inasmuch as plaintiff had never had the legal title, her mother having conveyed it to the defendant while she held it, a court of law could take no cognizance of a purely equitable title. But that objection, if good there, is not here; for this is a suit in equity. As to the validity of the original sale, the court in that case says: "One of the powers inherent in the court of chancery is the protection of infants and their estates. The authority to sell the estate of infants of an equitable character independently of any statutory power, has been exercised by the court of chancery in several instances in this state. We are referred to cases fully sustaining our position;" citing *Cochran vs. Van Surley* and *Pitcher vs. Carter*, 4 Sandf. Ch. 1. But it appears that at the time the sales in *Anderson vs. Mather* and *Pitcher vs. Carter* occured (in 1835) a general statute had been in force in New York for several years expressly authorizing such sales. (2

Rev. Stat. 1829, sec 170). In *Pitcher vs. Carter*, a mortgage of the interest of infants in real estate, for the purpose of improveing the property and rendering it productive, is held void because the chancellor making the order was deceived by the mother and guardian of the infants as to the fact that the buildings had been burned while occupied by responsible tenants for long terms under written leases, which did not exempt them from the payment of rent notwithstanding the destruction of the buildings. A decree of foreclosure was refused; and it was further held that by reason of the mortgagee's knowledge of the facts which were kept from the court, authorizinging the mortgage, they could have no recourse in equity against the infants, either under the mortgage or against their property for the improvements put upon it by the money loaned. It will be observed that in that case the basis of the proceeding was the unproductiveness of the property in its unimproved condition, and the necessary improvement of it in order to secure an income for the support of the infants.

So that as to the quoted statement upon which Justice Collier rests the judgment of the territorial Supreme court, it would seem it was a *dictum*, and if treated as a decision, it has been expressly overruled by this court. And as to the case of *Anderson vs. Mathews*, this is largely *dictum*, and is based upon the overruled decision in *Cochran vs. Van Surley*.

Whatever may be the character of the interest,

or whatever view may be taken of the jurisdiction of the court to pass the order of September, 1866, there can be no question, we apprehend, that this bill, in its substance, is to enforce the alleged contract or the order of September based upon it. If something were not needed to supplement that order by declaring its legal effect, or by bringing into it some fact not appearing, this suit was unnecessarily instituted. When the case was here before the opinion, after reversing the judgment in favor of the Maxwell company, made a suggestion that a bill might properly be filed to execute the decree of September, 1866, or determine its effect. Of course, in this suggestion, this court did not assume to state everything which should be made to appear under such a bill, nor to anticipate the issues which might be presented. It may be assumed that the amended bill now before the court was the outgrowth of this suggestion. But it is submitted that before complainants can ask a court of equity to decree that the order of September, 1866, or the supposed contract upon which it was based, divested the title of these infant appellants, they must make at least such showing as is requisite to secure the specific performance of contracts between persons *sui juris*, viz; that the contract or order was or is equitable, just, fair, reasonable and free from fraud or suspicion in obtaining it.

Waterm. Spec. Per. secs. 158, 161, 162, 167, 170.

Patterson vs. Bloomer, 35 Conn. 57.
Swint vs. Carr, 76 Ga. 322.
Kelly vs. Cent. P. R. Co. 74 Cala. 557.
Cathcart vs. Robinson, 5 Pet. 264, 276-9.
M. & M. R. Co. vs. Cresswell, 91 U. S. 643.

In Cathcart vs. Robinson, *supra*, this court, by Chief Justice MARSHALL, say: "The difference between the degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. [Citations]. It is said that the plaintiff must come into court with clean hands, and that the defendant may resist a bill for specific performance by showing that under the circumstances the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement, or that it is unconscientious or unreasonable, or that there has been concealment, misrepresentation, or any unfairness, are enumerated among the causes which will induce the court to refuse its aid. [Citations]. If to any unfairness a great inequality between the price and value be added, a court of chancery will not afford its aid." (P. 276). The alleged contract by these infants, or those claiming to act for them, is confessedly the foundation for the order of court relied on, and in order to its enforcement it is submitted that the Maxwell company should show it possesses the qualities enumerated. We do not understand that judgments are

exempted from this note when they do not appear on their face to be such as in equity ought to be enforced.

Story's Eq. Pl. secs. 430, 641.

Not only is the jurisdiction of the District court of Taos county to make the decree of September, 1866, denied, but its fairness and justice from every point of view is assailed. While the territorial Supreme court in its findings of fact declares "that no fraud, imposition or error has been shown to have entered into the transaction, or to have brought about said compromise decree," this is manifestly a conclusion of law rather than a finding of fact (U. S. vs. Ross, 92 U. S. 281). For the acts and declarations of Maxwell tending to show fraud or imposition on his part are first set out in detail. It is submitted, therefore, that the findings of fact justify the conclusion that the transaction as a whole, preceding and including the decree, was characterized by imposition and bad faith. Fraud, imposition or deceit is in nearly all cases an inference to be drawn from conduct, which, in view of the condition and relation of the parties, is inconsistent with good faith and fairness, and need not be shown by direct proof.

Kerr on Fr. & Mis. pp. 384-5.
Allore vs. Jewell, 94 U. S. 507.
Griffith vs. Godey, 113 U. S. 89.
Brown vs. Pitcairn, 148 Pa. St. 387.

It is found that Maxwell was an unscrupulous, resolute, tyrannical, determined man of large wealth and of such great power and influence that the weak feared to oppose him; that he made threats that unless the Bent heirs accepted what he offered them they would get nothing, and that no one should occupy any part of the grant; that Mrs. Bent was an ignorant, illiterate Mexican woman, unfamiliar with business and ignorant of her duties as guardian *ad litem* of her children, and of the extent or value of the grant, as well as the act of Congress confirming it, and of the particulars of the decree of June, 1865, establishing her children's rights. Maxwell's wealth, influence, power and threats were known to her, and influenced her in what she did in the premises. (Rec. p. 131). It is a fact of significance that, knowing her to be ignorant and subject to such domination and fear as his wealth, power and threats might bring her under, he had her appointed guardian *ad litem* for her children as a means of securing from her the alleged contract of sale. (Rec. p. 125, fol. 226). It also appears by the findings of fact that Maxwell represented to Scheurick, Mrs. Bent's known adviser, that the grant was not so large as it was supposed to be, and that it did not extend into Colorado or beyond Red river, when it did so extend over two hundred thousand acres beyond this limit. (Rec. pp. 121-2). It is true that it is further found that the boundary between Colorado and New

Mexico was not at that time definitely known; but there can be no pretense that the location of Red river was not known. It may be safely assumed that the definite boundary between different states is known to but few people, and there is no finding that the general location was not known to Maxwell beyond which a large part of the grant lay. Whether this was an unintentional misrepresentation is not important; for if a party assumes to know a fact material to a transaction, and states it, and it is relied on, as the finding show this was, he is as fully responsible to the party acting upon the representation as if it were known to be false.

Cabot vs. Christie, 42 Vt. 121.

Sears vs. Canaday, 53 N. Y. 298.

Prewitt vs. Trimble, 92 Ky. 176.

It is found or declared in the findings of fact, it is true, that the means of knowledge of the extent and character of the grant were open to Bent's heirs and to their counsel. But this does not qualify the effect of the misrepresentation, nor modify the other finding that Mrs. Bent was ignorant of the character, extent and value of the grant. Maxwell knew her ignorance and reliance upon him and others to whom he made these representations, and they could only have been made in his own interest and to deceive her. A party should not be permitted to induce another to believe and act on a statement of fact, and then insist that the statement should have been dis-

credited and investigation made into its truth or falsity.

Kerr on Fr. and Mis. pp. 78–80.
Backer vs. Pyne, 130 Ind. 231.

Maxwell had owned the greater part of the grant and occupied it for years, and was better informed as to its character and boundaries and what it contained than any of the Bent heirs were, or could ever become, without great expense.

The only attempt to meet the question as to the necessity or excuse for selling appellant's interest in the grant, is found in the introduction in evidence of the inventory filed by Mrs. Bent, as administratrix of her husband's estate, and debts proven against it. (Rec. pp. 121–3.) It is found as an inference from these records that the personal estate was not sufficient to pay the debts, but it is further found that those who were acquainted with Alfred Bent's affairs testify that he had other property at the time of his death than that inventoried, both personal and real, in New Mexico and in Colorado. (Rec. p. 123, fol. 240.) This report was not filed till more than fifteen months after Alfred Bent's death, and nearly a year after the attempted sale of the interest in question. Within that time the estate may have been largely used or dissipated for aught that appears or is known. There is practically no finding on this question, but the inferences to be drawn from the facts found, are that there was no necessity for the sale of this estate in order to the

support of the children. But if, as a matter of fact, the personal estate in New Mexico was insufficient to educate and maintain the children in May or September, 1866, unless this was made to appear to the court, and the order of sale based upon it, no support to the order could be derived from it,even if the court had jurisdiction, and this is denied. This would be so, independently of the duty of the guardian of the infants to apply the personal property in Colorado to the maintenance of the children, before asking that any interest in lands be sold for that purpose.

While inadequacy of price alone is not usually a ground for cancelling a contract or refusing to enforce it; yet, when taken in connection with other evidence of imposition, deception or hardship, it may be, even between persons *sui juris*. How much more rigidly should the rule be applied in such cases as this?

It seems to be deemed by counsel a pertinent, if not an important fact, in this case, that Scheurick and Hicklin accepted the same rate of compensation for their interest which was contracted to be paid Mrs. Bent for her children's interest. Equal importance is given to the fact, as found, that the heirs of Beaubien and Miranda accepted a like rate of compensation. But we submit that such facts have no legal importance in the case at bar, wherein is involved the interests of minors. Persons *sui juris* might be influenced by many considera-

tions to accept a very small price for their property because of the immediate use they could make of the money to greater advantage in business or speculation. No such use can be made of the money of infants. It can only be loaned out at the usual rate of interest. The consideration which may have influenced others is illustrated by the answer of Miranda, who states that he had before "for a consideration greatly under the value of his original and real interest in and to said grant, sold and transferred by quit-claim deed all his said right, title, and interest, to the said Lucien B. Maxwell." (Rec. p. 108, fol. 195). A very suggestive fact bearing on the question of value is the sale of the grant, about three years after the transactions in question, to the Maxwell company for $1,350,000. (Exhibit E, to complainants bill, p. 20).

But in cases of this kind it is respectfully submitted it is not enough to show that the price paid, or agreed to be paid, was adequate at the time. The conversion of the real estate of infants into personalty or money is not favored, because of the liability to its loss. Courts of equity in all jurisdictions, whether there is a statute authorizing it or not, set their faces against the unnecessary sale of the interest of infants in lands, as tending to the loss or dissipation of their patrimony. This is emphasized in *Hartman vs. Hartman*, 59 Ill. 103, which was a partition suit instituted on behalf of infants. The Supreme court of that state says: "This proceeding

has been instituted on behalf of the minors. No reason has been shown why partition should be granted. We cannot perceive that it would be for the interest of the minors to grant the division. A decree in their favor would necessarily result in a sale, for the proof shows that there could be no partition. The answer and affidavit of appellee also discloses that his sole object is to obtain the money. We are satisfied that the land is the safest investment. It cannot be squandered as too often happens with the money of infants. It is now worth $80 per acre—lying in one of the richest and fairest portions of the state—and will probably increase in value. It is permanent, and cannot be lost by dishonesty or carelessness. Valuable coal mines, too, underlie its surface, and their development will probably prove a source of large profit. We cannot consent that this property, now safe from the fluctuations of prices and the accidents of money lending, and the faithlessness of guardians, shall, without any necessity, be changed into a fund which may take wings and fly away. It might prove a grievous wrong to these children, of which we have no ambition to be guilty." This language is a fulfilled proyhesy in the case at bar, if this decree shall be affirmed.

The court declines in this case to assume the responsibility of fixing a definite value upon the property at the time of the transaction, and contents itself with the statement that the opinions of wit-

nesses place the value at 2 1-2 cents to $1.25 per acre. There is nothing even to indicate toward which figures the weight of the testimony gravitated. The price paid did not even approximate a medium between the two extremes, but on the contrary, is only about 4 cents per acre—1 1-2 cents per acre above the minimun which the Maxwell Company could secure a witness to name as the market value of the property. And this for an estate found to contain some of the best and most valuable lands in the territory; embracing a large number of acres of grazing and tillable lands; traversed by several streams, furnishing water for irrigation; a small part of which was cultivated in May, 1866, and, in addition containing large bodies of timber, and known to contain considerable deposits of coal, and then believed, and has since been proven, to contain considerable deposits of precious metals, gold and silver; about 200,000 acres of which lay in the state of Colorado. (Rec. pp. 120-1). Justice Collier is constrained to declare in the opinion filed, that while not disposed to enter into a discussion of the testimony tending to impeach the decree of September, 1866, for fraud in obtaining it, he is not prepared in view of the testimony submitted since the decision in *Thompson vs. Maxwell*, 95 U. S. 400, to say that the proofs show a case which supports the conclusions of the decree to the effect that the terms of the so-called compromise made by the adult parties to the suit, were advantageous to the

said infants. (Rec. in No. 91, p. 85, fol. 143).

It is further found that "it cannot be said from the testimony that there was a market for such grants at the time, in the sense of a demand for them, their value being largely speculative for the future." No more cogent reason could have existed why the estate should not have been sold than that there was no demand or market for such property at the time. The property was unimproved, timbered, grazing and mineral lands, not subject to waste by falling into decay, and not even subject to taxation; the revenues of the territory at the time being derived, it seems, entirely from licenses and personal property. Therefore, time could only increase and not diminish the value of the property, even if the country remained in its then undeveloped condition. But there was every reason to expect growth of population and development. The war had but recently closed and released hundreds of thousands of men from enforced absence from their ordinary industrial pursuits, and had left the entire south under such a desolating blight that its enterprising young men would be almost driven to seek more inviting fields of industry and enterprise. Railroad companies had been incorporated by the United States government and the territory of Kansas, to build roads afterward known as the Union Pacific, Kansas Pacific and Atchison, Topeka & Santa Fe, with land grants to aid them; the latter to build from Atchison on the Missouri

river through this grant to Santa Fe, in New Mexico. The construction of the Union Pacific line had already been begun and the Atchison, Topeka & Santa Fe line was completed through the grant while appellants were yet children. Emigration from the south and the east was thus invited, and came in large numbers into the territory now constituting Nebraska, Kansas and Colorado and into New Mexico. With such prospects as these, and no demand for the property, and no necessity for it, the sale of the interests of these infants in this splendid patrimony, with almost absolute certainty that by the time they should attain their majority, it would be as competent in value as it was then princely and magnificent in extent, was little short of a crime.

It is insisted, however, that the transaction was a "compromise of a doubtful and uncertain claim" on the part of the infants, and as courts favor compromises, Justice Collier thinks this decree should be accepted as a "fair and reasonable exercise of the chancellor's discretion." And this notwithstanding the declaration of the learned justice that he cannot say, in the light of the facts we have just detailed, that the sale was to the advantage of the infants. If it was not to their advantage, and it surely was not, it must have been to their disadvantage, and if to their disadvantage, it matters not what the character of their title was or whether it was a sale or a compromise of a doubtful right, it cannot be sustained or enforced

in this suit against them. But while the bill alleges a compromise and the decree of September, 1866, speaks of a settlement, and the opinion of Justice Collier also speaks of the transaction as a compromise, the court expressly finds that "Scheurick and the other complainants did not consider their claim after the decree of 1865 as being doubtful or uncertain." (Rec. p. 126, fol. 227). That finding is directly responsive to the allegation of the amended bill, and removes every support to the theory that the transaction was a compromise on the part of Bent's heirs of a doubtful claim. A further finding is made, in immediate connection with the other, that one of the reasons influencing the Bent heirs in the transaction, was that the law suit involving the partition of the property might drag along indefinitely, Maxwell having declared to Scheurick that he would "out-law them or put them off from court to court, he having the means to do so, and having some time before told Scheurick that he paid his attorneys one thousand dollars to put the case off for six months." This finding, in connection with Maxwell's power, influence and threats before referred to, suggests the reason the partition had not before been made, and the facility with which he was enabled to bring those who opposed him, in matters of personal concern, to his own terms, whether by contract or court orders.

But this record should estop the Maxwell com-

pany from setting up the claim that the transaction was not intended as a sale of an established and recognized interest in the grant. We have already referred to the character of the orders Maxwell secured to be entered in April, 1866, and of the deed his attorney exacted of the ignorant guardian *ad litem* of these appellants. The company's attitude, in view of the necessities of the case now made, is that the children in fact had no interest in the grant. And yet it is claimed that the consideration paid for the pretended compromise was greater than the property conveyed by the warranty deed of May, 1866, was worth! In compromises both parties are supposed to yield something, but under the contention here made, appellants had nothing to convey, and Maxwell paid them more for what they pretended to have than it was worth, if they had had it. Certainly at the time of the transaction Maxwell did not understand that he was buying his peace of these weak and helpless people, instead of their interest in the grant which had a year before been decreed to them.

But compromise agreements brought about by imposition, misrepresentation, threats and other unfair means are not less tainted and invalid than other contracts. Nor have infants, their guardians, or their attorneys, any greater authority to concede away, release or compromise their rights or even arbitrate them, when in dispute, than to sell and

convey them when uncontroverted.

Tyler Inf. & Cov. p. 55.
Baker vs. Lovett, 6 Mass. 78.
Fridge vs. State, 3 Gill. & Johns. 115.
Swint vs. Carr, 76 Ga. 322.
Pitcher vs. Turin Plank R. Co. 10 Barb. 436.
Kingsbury vs. Buckner, 134 U. S. 650.

In the case last cited this court held that the consent of the guardian *ad litem* of infant defendants to transfer an appeal from one grand division to the Supreme court of the state of Illinois to another, to facilitate an early disposition of it, deprived the infants of no advantage or right whatever, and was therefore not subject to objection. But Mr. Justice HARLAN, who wrote the opinion, declares in this connection: "It is undoubtedly the rule in Illinois, as elsewhere, that the next friend, or guardian *ad litem* cannot by admissions or stipulations surrender the rights of the infant. The court, whose duty it is to protect the interest of infants, should see to it that they are not bargained away by those assuming or appointed to represent them."

In *Baker vs. Lovett*, and *Pitcher vs. Turin Plank R. Co. supra*, compromises had been made and executed by minors, of pending or threatened litigation, and in both cases it is held that, having no capacity to release rights in one case, or to concede a liability in the other when it did not exist, the compromises

not appearing to be for their advantage, should be set aside.

But suppose the interest to have been only a doubtful claim in a doubtful lawsuit, and not a decreed right to an undivided twelfth of the grant, and the compromise of the litigation had been the question dealt with by both parties and the court, was it less the duty of the court as the guardian of the interests of the infants, to inquire as to the value of the subject of compromise? Was it a matter of no consequence that the property claimed was not only worth six thousand dollars, but one hundred thousand dollars? The probability of the successful issue of the suit, if successful issue had not already been reached by the decree of June, 1865, was an important factor in the so-called compromise. Must we presume that the District court of Taos county determined, without petition, motion, or argument, that its judgment given a year before after demurrer, answer, proofs, and arguments, was of such a doubtful character that the interests decreed by it should be treated as the foot-ball of chance with all the chances in favor of Maxwell and the reversal of the decree? Surely we must presume the court had confidence in its own decree thus deliberately given.

We have examined in detail all the grounds, or suggested grounds, upon which the territorial Supreme court bases its judgment. But at the argument in that court other positions were taken by counsel

for appellees, to which no reference is made in the opinion of Mr. Justice Collier, and which we may assume were regarded as untenable. We cannot safely assume, however, that those grounds will not be urged here and that this court will not entertain them.

The Will of Alfred Bent.

One of these contentions was that Alfred Bent's will invested his widow with title to the property in question, and therefore his children and heirs-at-law had no interest at the time steps were taken to acquire the title from them. The first objection to this is that appellees ought not to be heard to make such contention. Not only were appellants substituted as the heirs-at-law of Alfred Bent, in the cause in which the decree of June, 1865, was rendered, at the instance of Maxwell, but both subsequent orders in that case, including the decree of September, 1866, together with the deed taken from their mother, treated them as the inheritors of this estate. Not only that, but the original bill filed in 1870, as well as this amended bill filed in 1880, after the cause was remanded from this court, proceeded against these appellants as the "minor children and heirs" of Alfred Bent. (Rec. p. 67, fol. 117). The order of September, 1866, directs Mrs. Bent as guardian *ad litem* of the "minor heirs of the said Alfred Bent," naming these appellants, to convey "their right, title, interest, claim and de-

mand of and in the lands in controversy in this cause." (Rec. p. 130, fol. 234). It is said in the amended bill "that in the proceedings in said suit it is doubtful whether against the said minor children and heirs of Alfred Bent" it sufficiently appears they have no title, etc. (Rec. p. 69, fol. 121). Mrs. Bent is nowhere referred to, or made a party, otherwise than as administratrix, or guardian *ad litem* of her children. It is found, as a fact in this case that this will was not produced in evidence until the close of the testimony taken under the Maxwell company's amended bill 1886, (erroneously printed 1866), and after the decision of Thompson vs. Maxwell, 3 N. M. 269, by the Supreme court of the territory. (Rec. p. 124, fol. 224). No excuse is given for not producing it before. But no effect is given by the decision here appealed from to this will. Under the decision made the will could not qualify or modify the effect of the decision reported in 3 N. M. 269, as the law of the case or otherwise. No amendment was offered or made to the amended bill taking any cognizance of this will at all. For these reasons we submit it is entitled to no consideration in determining this appeal. Surely appellees should be bound by some theory or line of attack in this unequal contest. The original bill declared the orders of April and September, 1866, were without authority and invalid. By the amended bill this statement is retracted and those orders are relied on as a basis of title. By both

bills, filed ten years apart, these appellants are proceeded against as the heirs-at-law of Alfred Bent and as the inheritors of this estate. At the conclusion of the testimony this will was presented, and there is another change of front. We submit that at some point in this litigation the doctrine of estoppel should be applied.

But if the will should be held to be properly before this court, then two questions arise under it, viz: (1) Does it vest the legal title to the property in Guadalupe Bent? (2) If it does, is it a valid disposition of the property as against the children of Alfred Bent, under the laws of New Mexico? If either of these questions be determined in favor of Bent's heirs, then the instrument does not affect the decision of any question before the court. The will is brief and the only words which need claim our attention are: "I give and bequeath unto my wife Guadalupe Luz Bent for the maintenance of her and my three children, Charles, William and Silas Bent, all my real and personal property. * * * I desire that my said wife should be my executor, and may join with her if necessary any person who may desire for her benefit and that of my children." (Rec. p. 121). If the will be interpreted as devising the property to the widow, and investing her with the legal title, then it is clearly in contravention of the statute law of the territory, and the children inherit the property from their father as all parties had assumed they did until the instrument was

produced in evidence. By section 10, of chapter 5, of the Revised Statutes of 1865, page 486, it is provided as follows: "Parents and ascendants have a right to disinherit their descendants for the following causes." Then follows an enumeration of eleven different offenses against parents, not one of which these children, by reason of their tender years, were capable of committing; and there is no pretense that they were subject to the penalty of disinheritance.

The most favorable construction for the Maxwell company which this instrument admits of, is that it vests the title of the property in the mother in trust for her children. If it does not, it is void. As such trustee she had no more authority to convey it without direction of a court of competent jurisdiction on proper showing, than if the property had been devised directly to them or had been inherited by them. Wills analogous to this, and some almost precisely similar, have frequently been before the courts for construction in jurisdictions in which there was no restriction or limitation upon the power of alienation, except that the testator should be *compos mentis* and free from duress and undue influence. If in such jurisdiction wills devising property, in substantially the same terms as are here used, are held to vest the right and title in the testator's children, certainly this instrument should be so construed, in view of the statute law of the territory.

When a trust is declared, equity is not favorable to a construction which gives the trustee absolute power or authority to sell, even where he is clothed with a large discretion; and the conversion of realty into personalty, and *vise versa*, will not be allowed except where there is an absolute necessity for it.

Haydell vs. Hersh, 5 Mo. App. 267.

The heir is always favored in law; and while no positive rule can be laid down which shall determine in all cases what terms in a will carry a beneficial interest or create a trust, courts will not be governed by any technical rules, but look to the whole instrument to ascertain the testator's intention, and any language which indicates an intention to stamp upon a devise, the character of a trust, will be sufficient.

Saylor vs. Paine, 31 Md. 158.

We submit that where there are legal limitations or restrictions upon the power of testamentary disposition, the language used in a will must be so interpreted, if possible, as not to contravene the law; and if it does not admit of such construction, the instrument must be held void. So, if Alfred Bent's will must be interpreted as devising his property to his wife, with the power of alienation at her pleasure, it is in conflict with the statute, and void. If, on the other hand, it vests in her the title as trustee for the maintenance and support of his children, it may be sustained; but under either

construction the attempted sale, under the circumstances disclosed in the record, was void. In neither case could it be sold, even under order of court, except for the necessary support of the children, and this brings us back to the proposition already discussed at length. If the children's interest in the property was only what their mother might be disposed and able to give them of the proceeds of a a sale, it cannot be said that their father's will gave them any right in his estate at all. If they had no right or title to the property devised, they had none to the proceeds of its sale. Her rights and powers were not essentially greater than they would have been had she been their testamentary guardian, and certainly it would not be contended that she could, in that capacity, make a valid sale of their property. The extent of her authority would be to devote the rents and profits of the estate to their maintenance and education. As a test of the effect of the will, as construed by counsel for appellees, let it be supposed that Mrs. Bent had been the second wife of her husband, and these appellants his children by a former marriage; would the property in question have descended on her death to her heirs or to these complainants? Or if she had made a testamentary disposition of it to others, would her devisees take the property or these appellants? The questions suggest their own answers.

In *Dunscomb vs. Holst*, 13 Fed. Rep. 11, it is held by the United States Circuit court, for the district

of Tennessee, that, under a devise to the daughter of the testator "for her and her children's sole and separate use," the daughter had no authority to sell the property, and her conveyance did not give title.

In *Charles vs. Ladd*, 153 Mass. 126, the Supreme court of Massachusetts held that if a testator devise all his property to his wife "to her use and behoof forever," but provides that if any of said property be not expended for her support and maintenance, it shall be disposed of in a particular manner, the will does not vest the property in her absolutely.

In *Ward vs. Peloubet*, 10 N. J. Eq. 304, was presented for construction to the Court of Errors and Appeals of New Jersey, a will whereby the testator gave to his wife all his property "to be disposed of in such manner as she may think proper for the benefit of the family," giving some particular directions as to the education of his children, leaving his wife free to exercise her discretion as to what "donations" she should make on their attaining their majority, but directing that they should be made as "near equal as can be." It was held that the wife took the estate in trust for herself and children, and that she had no right to dispose of it by will.

If the court shall deem this will a factor of any importance in the determination of this case, and its construction doubtful, the position of appellants will be found abundantly sustained by the following

additional authorties:

Markham vs. Guerrant, 4 Leigh. 279.
Hill vs. McRae, 37 Ala. 175.
Johnson vs. Hurley, 3 Tenn. Ch. 258.
Graff vs. Castleman, 5 Rand. 195.
Stillwell vs. Leary, (Ky.) 1 S. W. 590.
Pratt vs. Miller, (Neb.) 37 N. W. 263.
Noe vs. Kern, (Mo.) 6 S. W. 239.
O'Reilly vs. McKiernan, (Ky.) 13 S. W. 360.
Elliott vs. Elliott, (Ind.) 20 N. E. 264-6.

At the hearing below the learned counsel referred to and relied upon the decision of this court, in *Bent vs. Thompson*, 138 U. S. 238, as having some bearing on the effect or construction of this will. We have been unable to discover the grounds for such a contention. Believing the will not to have been executed under such circumstances as to entitle it to be probated and that it was irregularly probated, as a precautionary measure the heirs of Albert Bent applied to the probate court of Taos county for the re-probate of the will; and this court held, confirming the judgment of the territorial Supreme court, that the application was barred by the New Mexico statute of limitations. We find no intimation as to the effect of the instrument as a testamentary disposition of the property in question.

The range and scope of this discussion have been dictated by the counsel for appellee, and the opinion of Justice Collier, rather than by our choice.

In our judgment the consideration of many of these questions is wholly unnecessary to the determination of this appeal. But the importance of the case to our clients is such that we have not deemed it prudent to trust our own judgment as to what is or is not a vital question.

If apology be needed for the length and detail of this discussion, we hope the court may find it in the value of the property involved, the gravity of the questions considered, and in the importance of the issue to our clients.

It is respectfully submitted that the judgment of the Supreme court of New Mexico should be reversed and the bill dismissed.

CALDWELL YEAMAN,
E. T. WELLS,
R. T. McNEAL,
Solicitors for Appellants.

—IN THE—

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

GENERAL NO. 16,110: TERM NO. 91.

CHARLES BENT ET AL.
Complainants and Appellants,

vs.

GUADALUPE MIRANDA,
LUZ B. MAXWELL ET AL.
Defendants and Appellees.

Appeal from the Supreme Court of the Territory of New Mexico.

Statement of the Case.

The issues in this case are in all substantial respects the same as in the case No. 90, except that this is a bill by the defendants in the other suit for the enforcement of that part of the decree of June, 1865, which directs partition of the grant in question, and, if necessary to that end, the vacation of the decree of September, 1866, assuming to set aside the said de-

cree. In this case the complaint sets up as grounds for relief, substantially the same facts and presents the same questions of law, as are relied upon in Charles Bent's separate answer to the Maxwell company's bill. The same facts are found in both cases upon the same evidence, which by stipulation was used in both cases so far as pertinent.

There is no occasion for considering the cases separately in this court. A judgment of reversal in one, would probably, if not necessarily, carry with it a similar judgment in the other.

ASSIGNMENT OF ERRORS.

Though the errors assigned in this record are not, in their substance, different, there are some aspects of this cause which call for a different statement of errors complained of, and we therefore, reproduce here the assignment in full, from pages 89–91 of the record in this cause:

And the said appellants come now and say that in the record and proceedings of the Supreme court of the territory of New Mexico and in the final decree of the said Supreme court manifest error hath intervened in this, to-wit:

I.

The decree of the Supreme court of the territory of New Mexico affirms the decree theretofore

given in the District court, in and for the county of Colfax, in said territory, whereas in the decree of the said District court manifest error intervened, to the prejudice of the said appellants, and decree ought to have been given in the Supreme court of the territory of New Mexico reversing and annulling the decree so given in the District court.

II.

Also in this, towit, that the facts found and declared by the Supreme court of the territory of New Mexico are not sufficient to sustain the decree given in the District court of the county of Colfax aforesaid, nor the decree of affirmation thereof given in the Supreme court of the territory of New Mexico, but, on the contrary thereof, upon the facts found by the said Supreme court of the territory of New Mexico, the decree given in the District court of the said county of Colfax ought to have been reversed, annulled, and in all things held for naught.

III.

Also in this, towit, that in and by the said record and proceedings it doth appear that by a certain final decree made and given in the District court in and for the county of Taos, in the territory of New Mexico, on the 3rd day of June, 1865, Alfred Bent, ancestor of the now plaintiffs and appellants, was vested with one undivided twelfth part and share in the premises named in the bill of complaint of plaintiffs in the District court of the said county of Colfax, and the decree afterwards, at the September term, 1866, given in the said District court in and for the county of Taos, assuming to

vacate, annul and set aside the final decree given on the 3rd day of June, 1865, was and is erroneous and void as against appellants, and decree ought to have been given in the District court in and for the said county of Colfax according to the prayer of the complaint of these plaintiffs in the said District court, whereas in and by the judgment and opinion of the said Supreme court the final decree of June 3, 1865, so given in the District court of the said county of Taos, was declared to be interlocutory, and, further, in and by the judgment, decree and opinion of the Supreme court of the territory of New Mexico it is declared that the said decree entered at the September term, 1866, of the said District court in and for the county of Taos, assuming to vacate, annul and set aside the said former decree of the District court upon the consent merely of parties, not showing or setting forth who assumed to the said court to represent or consent for the now plaintiffs and appellants in that behalf, and no evidence being heard touching the matter, was and is nevertheless effectual to vacate, annul and set aside such former decree in favor of plaintiff's ancestor, the said Alfred Bent.

IV.

It appears by the record and proceedings of the said Supreme court that by a certain former decree and opinion rendered and given in this same suit in the said Supreme court of the territory of New Mexico, it was found, adjudged, decreed and declared that by a decree given in the District court in and for the said county of Taos, on the 3rd day

of June, 1865, as set forth in the bill of complaint of these plaintiffs herein, there was vested in Alfred Bent, ancestor of these plaintiffs, a legal estate in the undivided one-twelfth part in the lands in the said bill of complaint mentioned, and that the decree given in the said District court in and for the said county of Taos, at the September term, A. D. 1866, thereof, assuming and pretending to vacate and set aside such former decree in the said District court, was wholly erroneous and void; nevertheless the said Supreme court of the territory of New Mexico, by the decree and opinion rendered and given herein, at the July term thereof, last past, doth in effect find, declare and adjudge that the decree so given in the District court in and for the said county of Taos, at the September term, 1866, was, effectual to vacate, annul and set aside such prior decree of the said District court in and for the said county of Taos.

Wherefore, for the errors aforesaid and manifold other errors, in the said record of proceedings and in the decree of the said Supreme Court of the territory of New Mexico appearing, the said Charles Bent, Alberto Silas Bent and Juliano Bent pray that the decree of the Supreme court of the territory of New Mexico and the decree given herein in the district court in and for the county of Colfax may be reversed, annulled, and altogether held for naught, and that plaintiffs be restored to all things which by virtue thereof they have lost, and they also pray that decree be given for their costs in this behalf expended.

It is respectfully submitted that for the reasons already urged in our brief in the other case, the judgment in this should be reversed, and complainants and appellants be allowed to proceed with the execution of the decree in their favor by the partition of the property in question and an accounting.

CALDWELL YEAMAN,
E. T. WELLS,
R. T. McNEAL,
Solicitors for Appellants.

J. G. CARLISLE,
of Counsel.